SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1049

STATE OF TEXAS,

Petitioner,

vs.

ALBERTO BALLI, ET AL.,

Respondents

BRIEF IN SUPPORT OF THE APPLICATION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Supreme Court of Texas is reported in 144 Tex. , 190 S. W. (2d) 71. The opinion of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, sitting at San Antonio, is reported in 173 S. W. (2) 522.

Grounds of Jurisdiction

This Court has jurisdiction under Section 2 of Article III of the Federal Constitution and Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 344 b) because a judgment has been rendered against the State of Texas by the highest Court in Texas in which a decision could be had and:

1. In denying the claim of Texas to accretions on Padre Island, the Supreme Court of Texas has denied a title

claimed by the State of Texas under the Annexation Agreement between the United States and the Republic of Texas.

2. In denying the claim of Texas to 19 leagues of land on Padre Island, the Supreme Court of Texas has denied a title claimed by the State of Texas under the Annexation Agreement between the United States and the Republic of Texas.

3. In upholding the claims of respondents to Padre Island on the basis of the guarantees to Mexican citizens as contained in the Treaty of Guadalupe-Hidalgo, the Supreme Court of Texas has misconstrued and misapplied the Treaty.

4. In refusing to give effect to the Texas Act of August 15, 1870, and Section 8, Article 14 of the Texas Constitution, the Supreme Court of Texas has drawn in question the validity of these Texas laws as being repugnant to the Treaty of Guadalupe-Hidalgo and paragraph 2, Article 6 of the Federal Constitution (assuming that the Treaty is applicable to land in Texas) and the Fourteenth Amendment to the Federal Constitution.

Statement of the Case

The suit was filed by petitioner in the District Court of Nueces County, Texas, at Corpus Christi on the 9th day of February, 1940, against approximately 200 defendants for the recovery of title and possession of Padre Island. The amended petition alleged a cause of action in trespass to try title and in the alternative for a forfeiture and in the alternative for a recovery of an undivided interest in the island (R. 6). The respondents all answered by pleas of not guilty and some of them specially pleaded their titles and asserted their occupation, use and payment of taxes (R. 40). The trial court entered an order per-

mitting petitioners Kernel Hughes, et al., who were vacancy applicants, to intervene as plaintiffs (R. 54). The State sued Hector Crandall by a supplemental petition and he answered with a cross-action (R. 2). The separate applications of Kernel Hughes, et al., and Hector Crandall for a mineral lease on Padre Island from the State had previously been denied by the Commissioner of the General Land Office of the State of Texas.

The case was tried before the Court without a jury and judgment was rendered on March 30, 1942, against the State and the intervening plaintiffs. No findings of facts or conclusions of law were filed by the trial court. The case was appealed by the State and the intervening plaintiffs to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, sitting at San Antonio, and that Court on June 23, 1943, rendered judgment affirming the judgment of the trial court (R. 255). A writ of error was granted by the Supreme Court of Texas to the State and to each of the intervening plaintiffs on November 3, 1943 (R. 293). The case was submitted on briefs and oral argument on January 12, 1944, and the Supreme Court of Texas on December 20, 1944, rendered its judgment affirming the judgment of the Court of Civil Appeals (R. 386). Separate motions for rehearing by petitioner and the intervening plaintiffs, who are also petitioners here, were overruled on November 7, 1945, with a dissenting opinion by three justices (R. 392). The time for filing the applications for writs of certiorari was extended to the 3rd day of April, 1946, by order of this Court entered the 15th day of January, 1946.

The following facts are established by the record:

1. Padre Island has, and in historic times has always had, well-defined natural boundaries; the Gulf of Mexico on the East, the Laguna Madre on the West, Corpus Christi Pass

on the North and the Pass of Brazos Santiago on the South. It is described in the State's Third Amended Original Petition, on which the case was tried, and in the judgment of the trial court, as containing 135,213 acres of land. It appears from the record, without controversy and by overwhelming proof, that its only value when the proceedings were had with the State of Tamaulipas in 1829 and, for the most part, since, has been as pasture or grazing land; and that in 1829 its value as pasture land lay in the fact that it was naturally enclosed. It also appears, without controversy, from the reports of the inspectors, and of the appraisers, appointed by the Tamaulipas authorities in 1828 and 1829, and the testimony of witnesses in this suit, and more especially that of J. Stuart Boyles, the State's surveyor and principal witness, and of Burton Dunn of Respondents, who has known the island all his life, that the portion of the island which is valuable for pasturage in 1829 and now lies next to and parallel with the Gulf or Eastern shore of the island, and is a relatively narrow area which approximates de la Fuente's survey on the island in 1828. If de la Fuente's survey is laid on the present map of the island it will cover the area shown in red on plaintiff's Exhibit 336, which is sent up as an original exhibit (R. 112,394).

The lands of this island were estimated by the Padre Nicolas Balli, in December, 1827, as comprising nineteen and one-half sitios, or square leagues (R. 132). The measurements of Domingo de la Fuente, the official surveyor designated by the Governor of Tamaulipas, according to his survey made in February, 1828, includes an area of only 11.15 sitios, or square leagues (R. 158). The Commissioners who examined the Balli claim in 1851 reported to the Legislature of Texas that "we feel confident that the island called Padre Island contained or embraces

over thirty leagues of land" (R. 203). As surveyed by Boyles in 1941, the area of the island is somewhat more than thirty leagues (R. 34). The excess in acreage surveyed by Boyles in 1941, as compared with that shown by de la Fuente's "Plan Demonstrativo", of 1828, consists of bare white sand, unfit for grazing or other surface use (R. 122).

2. By an Act of the Legislature of Texas, approved February 8, 1850 (Vol. 3, Gammel's Laws of Texas, p. 582) provision was made for the appointment of Commissioners to investigate Spanish and Mexican land titles in the area between the Nueces River and the Rio Grande. Commissioners Wm. H. Bourland and J. B. Miller were appointed under the provisions of this Act and made a report to the Governor of Texas—accompanied by an abstract of the proceedings had and recommendations made by the Commissioners. This abstract with regard to Padre Island (file No. 37), Cameron County, said:

> *"Nicolas Grisanti and Jose Maria Tobar apply for 11½ leagues of pasture land called 'Padre Island'* originally granted by the Spanish Government to one Nicolas Balli and subsequently confirmed to him and his nephew Juan Jose Balli by the Mexican authorities. Witnesses proved the occupation of said tract of land by said original grantee and his nephew for the last fifty years; and that they kept thereon the requisite number of stock to entitle them to the grant of 11½ leagues, never having any adverse claimants. They having obtained a title from the proper authorities and resided upon the land peaceably for a number of years, *we recommend for confirmation 11½ leagues only to the heirs or assigns of original grantee, for we feel confident that the island called Padre Island contained or embraces over thirty leagues of land. It is therefore to be understood that we recommend only 11½ leagues of said island. For testimony in this case see File No. 37 Cameron County"* (R. 202, 203).

The Final Report of the Commissioners, with accompanying title papers and other evidence, was submitted to the Governor as the Act of 1850 required, and was by him transmitted to the Legislature for its action on each individual claim. This Report and its supporting evidence was referred by the Legislature to an unusually able Select Committee of the House and Senate, which re-examined each claim on its own merits, and drew a bill which provided for unqualified confirmation of each of the grants as recommended by Miller and Bourland (R. 203).

3. The respondents deraign title by, through and under Nicolas Grisante and José Maria Tovar (R. 422).

4. Pursuant to this report, the Legislature of Texas adopted the bill thus recommended as an Act approved February 10, 1852 (Ex. 8D; Gammel's Laws of Texas, Vol. III, p. 941; Paschal's Digest of the Laws of Texas, Vol. 1, p. 734, Article 4461; S. of F. p. j) entitled "An Act to Relinquish the Right of the State to Certain Lands Therein Named" (R. 413). The part of the Act confirming the Balli claim reads:

> "Section 1. Be it enacted by the Legislature of the State of Texas, that the State of Texas hereby relinquishes all her right and interest in the following described lands to the original grantees thereof, their heirs and legal assigns, towit:
>
> COUNTY OF CAMERON
>
> "(12) Nicolas Balli and Juan Jose Balli, eleven and a half leagues called 'Padre Island' ".

5. It was proven that no Spanish on Mexican title pertaining to Padre Island has ever been filed in the General Land Office except the abstract of the Bourland and Miller Report; that no plat nor field notes of Padre Island was

filed in the General Land Office on or before January 1, 1880; that no field notes or plat of Padre Island has ever been filed in the General Land Office of Texas pursuant to the Act of February 10, 1852, the Act of August 15, 1870, or Section 8 of Article 14 of the Texas Constitution of 1876. (R. 81, 82).

Specification of Errors

1. The Supreme Court of Texas erred in holding that under the rule of the Spanish Civil Law which prevailed in the State of Tamaulipas, Mexico, in 1827-30, the accretions to Padre Island belonged to the owner of the upland estate and not to the sovereign.

2. The Supreme Court of Texas erred in holding that Article 4, Decree 72 of the National Colonization Law of Mexico of August 18, 1824 had no application to a grant of land by the State of Tamaulipas, Mexico, in 1827-30.

3. The Supreme Court of Texas erred in holding that Nicolas Balli and Juan José Balli received in 1827-30 from the State of Tamaulipas, Mexico, a grant to more than 11.15 leagues of land on Padre Island.

4. The Supreme Court of Texas erred in holding that the claims of respondents to Padre Island were protected by the Treaty of Guadalupe-Hidalgo.

5. The Supreme Court of Texas erred in holding that the Texas Act of August 15, 1870 was repugnant to the Treaty of Guadalupe-Hidalgo and Paragraph 2, Article 6 of the Federal Constitution and the Fourteenth Amendment to the Federal Constitution.

6. The Supreme Court of Texas erred in holding that Texas was impotent, by reason of the Treaty of Guadalupe-Hidalgo and paragraph 2 of Article 6 of the Federal Con-

stitution and the Fourteenth Amendment to the Federal Constitution, to forfeit land where claimants to Spanish or Mexican grants between the Nueces River and the Rio Grande, whose claims had been validated, failed to complete their surveys and the plats thereof and return their field notes to the General Land Office of Texas by January 1, 1880, in compliance with Section 8, Article 14 of the Texas Constitution of 1876.

Summary of Argument

The Supreme Court of Texas correctly held that the rights of the State and the respondents to Padre Island must be determined by the law in effect in Tamaulipas, Mexico in 1827-30. The right to accretions to the island since that date must be determined by the rule of the Spanish Civil Law, which was the law of Tamaulipas at that time. The determination of the quantity of land to which the Ballis were entitled by reason of their negotiations with the State of Tamaulipas is to be determined by the instruments contained in the *expediente*, or instructive dispatch, and the applicable provisions of the colonization laws of the State of Tamaulipas and the Federal Government of Mexico. These are normally matters of local law and the decisions of the Texas Courts would be conclusive if it were not for the guarantees contained in the Annexation Agreement between the United States and the Republic of Texas.[8]

The Annexation Agreement provides that the United States guarantees to the State of Texas "all the vacant and unappropriated lands" then lying within the limits of the Republic of Texas. Padre Island was then (March 1, 1845) within the limits of the Republic of Texas and petitioner claims that the whole island, or in the alternative,

[8] The Annexation Agreement is copied in the Appendix, p. 86 to 94.

19 leagues of the island, was "vacant and unappropriated lands" of the Republic of Texas and, in any event, the accretions to the island since 1829 were "vacant and unappropriated lands lying within its limits."

Under the Mexican law and the instruments in the *expediente* and the Confirmation Act of February 10, 1852, the respondents, as the successors in title to the Ballis, are entitled to 11½ leagues of land on Padre Island unless their title has been forfeited. They are entitled to 11½ leagues instead of 11.15 leagues because the Legislature of Texas on February 10, 1852, on application of Nicolas Grisante and José Maria Tovar, who were the successors to the Ballis and the predecessors in title of respondents, confirmed the Balli claim to 11½ leagues on Padre Island. Respondents are also entitled to only 11½ leagues because the original "grant" was void, since it was issued without the previous approbation of the Chief Executive of Mexico and the Validation Act of February 10, 1852 gives respondents the only title they have. Furthermore, under the Mexican law as it existed at the time the parties negotiated for the purchase of the land, Balli and his nephew could purchase only twelve leagues of land.

The State as a succeeding sovereign is entitled to all accretions to Padre Island since 1827-30, regardless of whether the Balli claim included the whole or only 11½ leagues of Padre Island.

The judgment of the Supreme Court of Texas, which is the highest Court of the State in which a decision could be had, raises Federal questions because the claim of Texas to accretions to Padre Island and to all the land on the island over and above 11½ leagues has its foundation in the Annexation Agreement between the United States and the Republic of Texas. This Court will examine the facts in order to determine for itself whether or not a Federal

question is involved and whether or not the evidence adequately sustains the findings of the majority opinion. If the dissenting opinion of Mr. Justice Sharp on the question of accretions (R. 371) is correct, the State has been deprived of the accretions to the island since 1829 to which it is entitled under guarantees of the United States, as contained in the Annexation Agreement. If the dissenting opinion of the three justices as to the proper construction of the instruments in the *expediente* and the interpretation of the provisions of Mexican law applicable thereto (R. 354) is correct, the State has been deprived of 83,132 acres (19 leagues) on Padre Island to which it is entitled under guarantees of the United States, as contained in the Annexation Agreement.

The majority of the Supreme Court of Texas fell into error in their determination of the outside boundaries of the original Mexican survey in this case by failing to differentiate between a survey bounded by a river and a survey on the upland facing the seashore. In Mexican surveys bordering a river the lines of the survey extend to the water's edge. If the called distances are too short to reach the river the survey will, nevertheless, be extended to the river, if it is called for, because the river is in every respect a natural monument. But this is not true of surveys on the coast. Under the Mexican civil law, which was in force in the State of Tamaulipas in 1827-30, the surveys for private individuals could extend no further than the line of highest tide. The tide lands between this line and the water's edge were reserved to the government and were not subject to private appropriation or ownership. The Gulf of Mexico and the Laguna Madre, which are affected by the ebb and flow of the tide, are not now and were not then natural monuments comparable to a river. Although de la Fuente, the Mexican surveyor, did not call for the east-west lines of his survey to extend to the

Laguna Madre on the west, the courts below have nevertheless extended these lines (in some instances several miles) in order to reach the Laguna Madre shore line. The lines of the original survey should be extended no further than their called distances east and west, and if they are laid down in this manner the survey will include only the 11.15 leagues of pasture land on Padre Island which in 1829 and now lies next to and parallel with the Gulf or Eastern shore of the island, and is a relatively narrow area which approximates de la Fuente's survey of the island in 1828.

The Annexation Agreement is the foundation of the State's right to all vacant and unappropriated lands in the State. If land has ever been titled or patented by the State or any prior sovereign, it ceases to be vacant and unappropriated land. It is not necessary under Texas practice for the State to specially plead its title in a suit for recovery of land. The mere act of bringing suit for a described tract and the exhibit of its petition in Court makes out a prima facie case of ownership for the State.

The respondents in this case did not offer in evidence any final grant or patent from any sovereign and, therefore, the burden rested upon them to disprove the Federal right rather than upon the State to prove it. In exercising its powers of review over decisions of State Courts this Court will follow the State practice, even as to the manner of raising a Federal question.

The Federal guarantees of the State's claim are presumed to have been relied on in this case by the petitioner without express allegation, because of the character of the suit. The courts take judicial notice of the historical facts on which the State bases its claim to all vacant and unappropriated land in Texas and of the laws of prior sovereigns. This Court will review those laws and the undisputed facts as shown by the *expediente* of proceedings

between the Ballis and the State of Tamaulipas and other record evidence in order to determine whether or not petitioners' rights under the Annexation Agreement have been impaired.

The decision of the majority opinion on the question of accretions is contrary to the decision of this Court in the case of *Ker and Co.* v. *Couden,* 223 U. S. 268. The decision of the majority opinion as to its interpretation of the Mexican laws limiting the quantity of land granted to one individual and its construction of the instruments in the *expediente* are contrary to the holding of this Court in the case of *Ely's Admr.* v. *U. S.,* 171 U. S. 220.

The Treaty of Guadalupe-Hidalgo has no relation to property included within the State of Texas, because on February 2, 1848, when the Treaty was adopted, land in the State of Texas had previously belonged to the Republic of Texas and did not come within the phrase "territories previously belonging to Mexico" as used in the Treaty.[9]

Although the majority opinion of the Supreme Court of Texas attempts to avoid an outright decision on the validity of Section 8, Article 14, of the Texas Constitution by giving it a spurious construction, the non-Federal ground is not adequate and the effect of the Court's decision is to deny to the State of Texas the power of requiring by reasonable regulation upon condition of forfeiture that the claimants to Mexican or Spanish grants between the Nueces River and the Rio Grande, whose claims had been validated, complete their surveys and identify their lands in order that they might be segregated from the public lands owned by the State. The Supreme Court of Texas and the Court of Civil Appeals each stated in their respective opinions that Texas does not have the power to forfeit a grant which was

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[9] Article VIII of the Treaty of Guadalupe-Hidalgo is copied in Appendix, p. 95.

good in 1876, when the Constitution was adopted, for failure to comply with the provisions of Section 8, Article 14, requiring the survey of Mexican and Spanish grants and the filing of field notes in the General Land Office of Texas. They hold that the claims of respondents are protected under the Treaty of Guadalupe-Hidalgo, paragraph 2 of Article 6 of the Federal Constitution, and the Fourteenth Amendment to the Federal Constitution. Their erroneous view on this Constitutional question is responsible for their strained and unreal construction of Section 8, Article 14, wherein they say that the words "forever barred" as used in that section mean that the claimants of Mexican or Spanish grants are only barred from obtaining patents to their lands from the State of Texas but are not barred from asserting their Mexican titles in the Courts of Texas. The Act of August 15, 1870 is, of course, not subject to this false interpretation because it contains the same provisions as Section 8 of Article 14 of the Constitution except that after the words "forever barred" it contains the provision that "such lands shall become part of the public domain of the State." The Act of August 15, 1870, is expressly referred to in Section 8 of Article 14 of the Texas Constitution. It is also referred to in the opinion of the Supreme Court of Texas and it was called to the attention of that Court and to each of the lower courts during the trial of this case. The failure of the Supreme Court of Texas to make an express holding with reference to the validity of the Act of August 15, 1870, under the Federal Constitution and the Treaty of Guadalupe-Hidalgo is further evidence of that Court's attempt to evade all Federal questions, and it is further evidence that the decision of the Supreme Court of Texas is not in fact based on non-Federal grounds. The Texas Act of August 15, 1870, and Section 8, Article 14 of the Texas Constitution are valid under the decisions of this Court in *Barker* v. *Harvey*, 181 U. S. 481; *Mitchell* v.

Furman, 180 U. S. 402; and *Bottiller* v. *Dominquez,* 130 U. S. 238, even if the Treaty of Guadalupe-Hidalgo should be held to be applicable to land in Texas between the Nueces River and the Rio Grande.

Argument

1. THE ATTORNEY GENERAL OF TEXAS HAS AUTHORITY TO APPLY FOR A WRIT OF CERTIORARI ON BEHALF OF THE STATE.

The Attorney General of Texas is a constitutional officer and his powers are prescribed by Section 22, Article 4 of the Constitution of Texas. Article 5420, Texas Vernon's Annotated Civil Statutes, reads in part as follows:

> "When any public lands are held, occupied or claimed by any person, association or corporation adversely to the State, or to any fund, or when lands are forfeited to the State for any cause, the Attorney General shall institute suit therefor, together for rent thereon, and for any damages thereto."

The authority of the Attorney General of Texas, under the above statute, to represent the State of Texas in all suits for the recovery of public lands is settled. *State* v. *Delesdenier,* 7 Texas 76; *Day Land & Cattle Co.* v. *State,* 68 Tex. 526, 4 S. W. 865; *Weatherly* v. *Jackson,* 123 Tex. 213, 71 S. W. (2d) 259; *Humble Oil & Refining Co.* v. *State, Tex. Civ. App.,* 162 S. W. (2d) 119, error refused; *Franks* v. *Krohn, Tex. Civ. App.,* 164 S. W. (2d) 529, error refused; *United States* v. *Texas,* 143 U. S. 621; *United States* v. *Texas,* 162 U. S. 1; *Oklahoma* v. *Texas,* 252 U. S. 372. The Attorney General of Texas is authorized to represent the State in the Supreme Court of the United States on an application for Writ of Certiorari to the Supreme Court of Texas. *Florida* v. *Mellon,* 273 U. S. 12; *Boynton* v. *Hutchinson Gas Co.,* 292 U. S. 601.

2. THE PORTION OF PADRE ISLAND COVERED BY THE ORIGINAL MEXICAN SURVEY.

It is the contention of petitioner that the original survey in 1828 by the Mexican surveyor Domingo de la Fuente covered only that part of Padre Island which was fit for the purpose for which Nicholas and Juan Jose Balli desired to use it; namely, cattle grazing. In other words, the only land on the island that Nicholas Balli and his nephew desired to purchase and the only land that was surveyed and the only land that they paid for was the 11.15 leagues of pasture land which in 1829 and now lies next to and parallel with the Gulf or Eastern shore of the island (R. 122).

The record does not disclose the amount of the accretion that has been added to the island since 1828. The Court of Civil Appeals and the Supreme Court of Texas discussed the civil law rule with reference to ownership of accretions on the seashore but made no fact findings with reference to the amount of accretions, if any. Both courts, however, assumed as a basis for their respective judgments that the island contained much more area in 1828 than the 11.15 leagues surveyed by de la Fuente. In this connection the Court of Civil Appeals said:

> "Assertion that Grant is Limited to 11½ Leagues.
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> "We first discuss the question from the standpoint of an assumption that there was in fact a substantial excess over 11.15 leagues in the island about the year 1829.
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> "As between the two assumptions, on the basis of the evidence, there is little to choose. The probability is that there was an excess and that there also were accretions. The writer is rather inclined to credit the Bourland and Miller estimate, especially in view of the fact that *the de la Fuente survey was apparently made for the purpose of estimating the amount of pasture land in the island*, for which the State of Tamaulipas

should be paid, rather than for the purpose of outlining the boundaries of the island which was entirely surrounded by water. *De la Fuente did not attempt to survey the Laguna Madre shore line.* He completed his survey in eight days. Boyles in 1941 took three months. This rather indicates that the survey was an estimate upon which the amount of the purchase price could be determined, and was so accepted by the Tamaulipas authorities at Victoria." 173 S. W. (2d) p. 539. (R. 242).

The dissenting opinion of the three justices of the Supreme Court of Texas says:

"From the reports made at the time of the survey by de la Fuente the length of Padre Island and the acreage embraced therein were undoubtedly about the same as when commissioners Bourland and Miller made their report in 1851." (R. 359). 190 S. W. (2d) p. 104.

The majority opinion of the Supreme Court of Texas says:

"The land had been denounced by the Ballis as 19½ sitios. This could have been based upon an earlier survey by the Spanish authorities. Because of the fact that the surveyor of Tamaulipas measured the land as containing 11.15 sitios, the inference must be drawn that the authorities of Tamaulipas survey was on a different basis and that the authorities of Tamaulipas were interested in the number of leagues of pasture land the island contained. * * *

"The visual inspection had judicially determined that the island contained no land suitable for cultivation and no wood land. Its only value was for pasturage. The only need, therefore, for the survey and for the visual inspection was to ascertain the amount in dues the grantees were required by law to pay. This was measured not by the number of leagues in the entire area of the island, but under the plain terms of the

statute by the number of leagues of pasture land it contained." (R. 345, 346). 190 S. W. (2) 97.

The "plain terms of the statute" which the court has reference to are the provisions of Article 23 of the Colonization Law of the State of Tamaulipas (1 Gammel's Laws of Texas, 457; Paschal's Digest of the Laws of Texas, p. 230; Vol. 1, Sayles' Early Laws of Texas, p. 135) which provides:

> "Art. 23. The new settlers shall pay to the State as an acknowledgment thirty dollars for each sitio of grazing land, uncultivated, or woodland, that is adjudicated to them; and for those having the benefit of running water an estimate shall be made by two competent persons, chosen by the executive and the settler, setting out from the established rule."

It is perfectly obvious that the "estimate" which "two competent persons" shall make is of the price per sitio to be paid for the land and not the amount or location of the land. The latter was determined, as in this case, by the survey made by the official surveyor and the price of the land where there was running water was fixed, as in this case, by two competent persons. The "two competent persons" who fixed the price of the 11.15 leagues the Ballis had applied to buy were Manuel de la Garza, who was appointed by the Government, and Antonio Maria Casas, who represented the interested parties, and they fixed the price of the land at $40 per sitio (R. 167, 168). The Ballis paid only $446.00 to the State of Tamaulipas for the land on Padre Island (R. 170) and this was on the basis of 11.15 leagues ($11.15 \times \$40 = \$446.00$). The price of public land was fixed by law at a certain price per sitio, and the officers of the Mexican State of Tamaulipas had no authority to sell it for less. The fact that at the time some land was considered as worthless was good reason for the purchaser to insist that it not be included in his survey but

it was not sufficient to enlarge the powers of Mexican officials so that they in their discretion would be authorized to give it away. *State* v. *DeLeon*, 64 Tex. 553. *United States* v. *Hartnell's Heirs*, 22 How. 286. *Ely's Admr.* v. *United States*, 171 U. S. 220.

The opinions of the Court of Civil Appeals and the majority opinion of the Supreme Court of Texas approach the case as though the petitioner was suing only to recover the excess acreage within the outside boundaries of the original survey. An alternative count in the State's petition is based on this theory (R. 38) but the primary contention below and the contention here is that the de la Fuente survey did not extend to the Laguna Madre shoreline and did not include anything but the pasture land, which then and now lies next to and parallel with the Gulf or Eastern shore of the island. This is the basic distinction between the majority and minority opinions of the Supreme Court of Texas. The majority of that Court says:

> "The official surveyor for the State of Tamaulipas ran a line approximately from north to south along the Gulf shore of the island and at right angles and at intervals usually of 10,000 varas cross lines to the shore of the Laguna Madre * * *.
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> "Regardless of the details of the survey or possible errors in calculations, the record exhibits, in our opinion, a clear intent on the part of the officials of the State of Tamaulipas to cede the entire island" (R. 345, 346) 190 S. W. (2d) p. 97.

The dissenting opinion of the three justices says:

> "De la Fuente attached to his field notes and report a map showing in detail the manner and method pursued by him in making such survey, as well as the distances and prominent points used to make such survey. It is worthy of notice that the map made by de la Fuente embracing the land claimed by the Ballis

does not show the shore lines of Laguna Madre, and in making the calls contained in his field notes he projected from the shore line on the Gulf side and he mentions the border of the Laguna only one time" (R. 358) 190 S. W. (2) p. 103.

"It is quite plain that when we consider the character of the land at the time the claim was filed and the application made therefor, and the reports made thereon, the only land the Ballis were interested in or desired to pay for was the land suitable for pasturage. They were not interested in the sand dunes and salty bays, as they were unfit at that time for any purpose and were of no value; and it is quite obvious from his report that de la Fuente did not include them in his survey. There is no evidence in this record tending to show that the Mexican authorities intended to grant the entire Padre Island to the Ballis, because the survey showed only 11.15 leagues and the payment received was for only that amount of land. The survey and the Treasurer's receipt describe it as 11.15 leagues, and the judge in certifying to the juridical possession of this land stated that he placed the purchasers in possession of the 'eleven sitios for large cattle and six caballerias'" (R. 360, 361) 190 S. W. (2) 104.

Chief Justice Alexander in this separate dissenting opinion says:

"While de la Fuente's field notes definitely call for the east or Gulf side of the island as the east boundary of the land to be granted to Balli and his nephew, there is only one call for the west or Laguna side of the island, and that is at the north end of the island where it is very narrow. The survey was made by beginning at the north end of the island and going south along the east side thereof and measuring—by stretching a cord—from east to west part of the way across the island at intervals of approximately five miles each. The length of these measurements from east to west were given. The amount of the land included in the survey was ascertained by assuming an imaginary line

from north to south connecting the extreme west ends of the cords stretched across the island. Many of the measurements from east to west did not extend halfway across the island according to the present dimensions of the island. When Miller and Bourland inspected the island in 1852 they found that it contained more than thirty leagues of land. In fact, at the time Balli and his nephew were negotiating for the purchase of the land in 1828 they admitted that the island contained over nineteen leagues. The survey made by de la Fuente for the land to be set aside to Balli and his nephew contained only 11.15 leagues. It is apparent, therefore, that the survey made by de la Fuente included only a narrow strip of land along the east side of the island. The footsteps of the surveyor can be folowed an dthe land located" (R. 383, 384) 190 S. W. (2d) 115, 116.

The area included in de la Fuente's survey according to his own field notes (R. 158) amounts to exactly 11.15 sitios or leagues. The majority of the Supreme Court of Texas fell into error by assuming that the Laguna Madre was a natural monument, and extending the east-west lines of the survey to it. The field notes, report, and map of de la Fuente not only do not call for Laguna Madre but also under the Mexican law as it then existed, the Mexican surveyor was prohibited from extending his survey to the Laguna Madre. In surveys that fronted on rivers it is true that under the Mexican law, the river was a natural monument and the survey extended to the water's edge. *City of Austin* v. *Hall*, 93 Tex. 591, 57 S. W. 563; *Stover* v. *Gilbert*, Tex. Com. App., 247 S. W. 841; *Maury* v. *Robinson*, 122 Tex. 213, 56 S. W. (2d) 438; *Maufrais* v. *State*, 142 Tex. 559, 180 S. W. (2) 144. Where the body of water, as here, was affected by the ebb and flow of the tide, the civil law rule was that the tidelands were reserved by the government

and the survey extended no further than the line of the highest tide. *Galveston City Surf Bathing Co.* v. *Heidenheimer*, 63 Tex. 559; *Roseborough* v. *Picton*, Tex. Civ. App., 34 S. W. 791; *Hynes* v. *Packard*, 92 Tex. 44; *Dincans* v. *Keeran, Tex. Civ. App.*, 192 S. W. 603; *Curry* v. *Port Lavaca Channel & Dock Co.*, Tex. Civ. App., 25 S. W. (2d) 987; *Borax Consolidated* v. *City of Los Angeles*, 296 U. S. 10, 15, 22. There is nothing in the field notes, report and map of de la Fuente or in any of the instruments included in the *expediente* to indicate that the Ballis applied to buy or that the State of Tamaulipas intended to sell the thousands of acres of flats, sand dunes and salty bays that in 1828 and now lie between the pasture land on Padre Island and the Laguna Madre shoreline. De la Fuente's survey did not call on the west for "the water's edge". *Cf. United States* v. *O'Donnell*, 303 U. S. 501; *Stewart* v. *United States*, 316 U. S. 354.

The policy of the Mexican law was to sell land "by the acre" and to limit the amount which could be sold to one individual. *State* v. *Sais*, 60 Tex. 87; *State* v. *DeLeon*, 64 Tex. 553; *United States* v. *Hartnell's Heirs*, 22 How. (63 U. S.) 286; *United States* v. *Pico*, 5 Wall. (72 U. S.) 536; *Ainsa* v. *United States*, 161 U. S. 208; *Ely's Adm'r* v. *United States*, 171 U. S. 220; *Camou* v. *United States*, 171 U. S. 277; *United States* v. *Maish*, 171 U. S. 242; *Ainsa* v. *United States*, 184 U. S. 639; *Reloj Cattle Co.* v. *United States*, 184 U. S. 624; *United States* v. *Green*, 185 U. S. 256. The statement in the majority opinion of the Supreme Court of Texas that "there was no quantitive limitation of which we are aware. The vacant domain was the King's special prerogative" (R. 331), has reference to the Spanish law. It was definitely not the law nor the policy of the law of Mexico after September 21, 1821, when Mexico gained its independence from Spain. See cases cited above.

In *Ely's Admr.* v. *United States, supra*, which involved a Mexican grant issued in 1825 and later lying in the then Territory of Arizona, this court said:

> "Sustaining the validity of the grant to the extent of the land paid for is but carrying out the spirit of the treaty, the obligations of international justice and the duties imposed by the act creating the Court of Private Land Claims. Article 8 of the Treaty of Guadalupe Hidalgo provided in reference to the ceded territory that 'Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax or charge whatever,' and that 'in the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected' 9 Stat. 929; and these stipulations were reaffirmed in Article 5 of the Gadsden treaty. 10 Stat. 1035. Article 6 of that treaty, which placed a limitation, provided 'that no grants of land within the territory ceded * * * will be considered valid or be recognized by the United States, or will any grants made previously be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico.' But this limitation is not to be understood as denying the obligations imposed by the rules of international law in the case of cession of territory, but simply as defining specifically the evidences of title which are to be recognized. The spirit of the treaty is fully carried out when the amount of land petitioned and paid for is secured to the grantee or his successors in interest. This Government promised to inviolably respect the property of Mexicans. That means the property as it then

was, and does not imply any addition to it. The cession did not increase rights. That which was beyond challenge before remained so after. That which was subject to challenge before did not become a vested right after. No duty rests on this Government to recognize the validity of a grant to any area of greater extent than was recognized by the government of Mexico. If that government had a right, as we have seen in Ainsa v. United States it had to compel payment for an overplus or resell such overplus to a third party, then this Government is under no moral or legal obligations to consider such overplus as granted, but may justly and equitably treat the grant as limited to the area purchased and paid for * * *." Ely's Adm'r v. United States, 171 U. S. at page 238, 239, 240.

The laws of the Federal Government of Mexico (Art. 12, Decree 72 of the National Colonization Law of Mexico of August 18, 1824; 1 Gammel's Laws of Texas, 98; Sayles' Early Laws of Texas, Art. 40; Paschal's Digest of the Laws of Texas, p. 210) and of the State of Tamaulipas (Art. 25 of the Colonization Law of Tamaulipas of December 15, 1826; 1 Gammel's Laws of Texas, 458; Sayles' Early Laws of Texas, Art. 89; Paschal's Digest of the Laws of Texas, p. 230), which limited the amount of land which was permitted to be united in the same hands, do not conclusively determine the quantity of land purchased by the Ballis. The original survey then, as now, determined the quantity and location of the land which was severed from the public domain. *Pinkerton* v. *Ledoux*, 129 U. S. 346, *Sullivan* v. *Texas*, 207 U. S. 416. But, under the facts of the present case, it is unreasonable to presume that the State of Tamaulipas intended to violate these laws and to convey an amount of land which is nearly three times the area which was surveyed and paid for. *United States* v. *Hartnell's Heirs*, 22 How. (63 U. S.) 286. *Ely's Adm'r* v. *United*

States, 171 U. S. 220. It is also significant that in 1833, after the transaction with the Ballis, the State of Tamaulipas continued its policy of limiting the amount of land which could be granted to one individual. Section 18 of the Colonization law of Tamaulipas of November 17, 1833 (Vol. 1, Sayles' Early Laws of Texas, p. 140) provided:

> "Lands For Breeding Animals—The applications that may be made to the government for lands for breeding animals, shall be admitted; first, if he who denounces them is not the owner of large tracts of land; second, if, in the judgment of the government, he proves the necessity for the lands; and the applicant shall be obliged to occupy each sitio with at least one hundred head of cattle or horses, within the precise period of four months, counting from the date of the issuance of the title; *and, even in such cases, the government cannot concede more than six sitios to any single individual.*"

This was the second and last law relating to the colonization of vacant lands which was passed by the State of Tamaulipas prior to the Texas Revolution in 1836 and it has been construed as limiting grants to one individual to six leagues. *State* v. *DeLeon*, 64 Tex. 553.

The Ballis acquired only the surface estate in the 11.15 leagues which they purchased from the State of Tamaulipas. The Mexican Government reserved all the minerals. *Cowan* v. *Hardeman*, 26 Tex. 217, 226; *Cox* v. *Robison*, 105 Tex. 426, 150 S. W. 1149, 1156. It was not until the adoption of the Texas Constitution of 1866 that the predecessors in title of respondents could have acquired any interest in the minerals on and under Padre Island. Section 39, Article 7 of that Constitution provided:

> "Art. VII, Sec. 39 (of the Constitution of 1866). That the State of Texas hereby releases to the owner of the soil all mines and mineral substances, that may be on

> the same, subject to such uniform rate of taxation as the legislature may impose. All islands along the Gulf coast of the State, not now patented or appropriated by locations under valid land certificates, are reserved from location or appropriated (appropriation) in any other manner by private individuals than as the legislature may direct." Paschal's Digest of the Laws of Texas, Vol. 1, p. 952.

The first sentence of this provision was included in the Texas Constitution of 1869, as Article 10, Section 9 (Paschal's Digest of the Laws of Texas, Vol. 2, p. 1122) and it was included in the present Texas Constitution, which was adopted in 1876, as Section 7 of Article 14. It has been held that this provision of the constitution has the effect of releasing "only those mines and minerals in soil *owned* at the time of its adoption." *Cox* v. *Robison*, 105 Tex. 426, 150 S. W. 1149. The Ballis, of course, did not own the soil in the thousands of acres of sand dunes, flats and salty bays lying outside of de la Fuente's survey. The survey included only the 11.15 leagues of pasture land and that is all that the Ballis paid for and all the land on the island that was worth $40 a league in 1827-30. Grisante and Tovar, the successors in title to the Ballis, recognized this when they applied in 1851 to the Bourland and Miller Commission for confirmation of only 11½ leagues of pasture land and the Commissioners determined it when they recommended that the Balli claim be confirmed for only 11½ leagues of land on Padre Island (R. 202).

3. ACCRETIONS ON THE SEASHORE BELONGED TO THE SOVEREIGN UNDER THE LAW OF TAMAULIPAS IN 1827-30

It has been noted above that there was no evidence as to the amount of the accretions to Padre Island since 1827-30. Both courts below presumed that there had been some accretions and on the basis of this presumption de-

cided the issue of ownership of accretions adversely to petitioner. It is not, of course, an abstract inquiry so far as Texas is concerned because there is 380 miles of Texas coast line, most of the upland along this coast having been disposed of to private individuals prior to 1840, when the rule of the Common Law was adopted as the rule of decision in Texas. 2 Gammel's Laws of Texas, 177, 178; Vol. 1, *Sayles' Early Laws of Texas*, Art. 707. That statute reads in part as follows:

> "Section 1. Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress Assembled, that the common law of England (so far as it is not inconsistent with the Constitution or the Acts of Congress now in force) shall, together with such acts be the rule of decision in this Republic, and shall continue in full force until altered or repealed by Congress.
>
> "Section 2. Be it further enacted, that all laws in force in this Republic, prior to the first of September, one thousand eight hundred and thirty-six (except the Laws of the Consultation and Provisional Government, now in force, and except such laws as relate exclusively to grants and the colonization of lands in the State of Coahuila and Texas, and also such laws as relate to the reservation of Islands and lands and also of salt lakes, licks and salt springs, mines and minerals of every description; made by the General and State Governments) be, and the same are hereby repealed."

It will be noted that this statute continues in force "such laws as relate exclusively to grants and the colonization of lands in the State of Coahuila and Texas" but does not say anything about the laws of the State of Tamaulipas. The Supreme Court of Texas has held in this case, however, that the Laws of Tamaulipas in effect in 1827-30 determine the question of the ownership of accretions to Padre Island (R. 349).

The majority opinion of the Supreme Court of Texas relies principally on an opinion written by "Dr. Mariano Rubio of the Universities of Barcelona and Madrid." We are unable to enlighten this Court as to just who Dr. Rubio is or to refer the Court to any of his other writings. His opinion, which was in the possession of counsel for respondents during the trial of this case, was dated August 16, 1940. This suit was filed prior to that date, but whether his opinion was written for the purposes of this suit, we do not know. We do know, of course, the authorities relied on by Mr. Justice Sharp in his dissenting opinion (R. 373-379). In our view the decision of this Court in *Ker & Co.* v. *Couden*, 223 U. S. 268, which is followed by Mr. Justice Sharp, conclusively settles the question.

The majority opinion of the Supreme Court of Texas literally brushed aside and refused to consider *Ker & Co.* v. *Couden* as an authority on the question now under discussion with the statement that:

> "The State presses the case of Ker v. Couden, 223 U. S. 268, 56 L. ed. 432. The court in that case 'was dealing with the law as it existed in the Philippines, not with that which prevails in this country, whether of *mixed antecedents* or the common law.' (Emphasis on the words '*Mixed antecedents*' is made by the majority opinion.) (R. 353).

The above-quoted statement of the majority opinion, we submit, reveals a total lack of understanding of the import of *Ker & Co.* v. *Couden* and of the questions to be determined in this case under the assignment now being discussed.

First, notice the majority opinion's emphasis on the words "*mixed antecedents*" in the quoted statement that *Ker & Co.* v. *Couden* dealt not with the law now prevailing in the United States, "whether of *mixed antecedents* or the

common law." The quotation of this sentence from *Ker & Co.* v. *Couden* and the emphasis given by the majority opinion to "mixed antecedents" indicate plainly that the majority opinion has refused to consider *Ker & Co.* v. *Couden* as an authority simply because that case did not deal with the law of accretion prevailing in this country in States whose present, *prevailing* law has as its antecedents either the common law, or "*mixed antecedents.*" Therefore, according to the plain implication by the court, since the *present,* prevailing law of Texas admittedly has *mixed antecedents* (in the case of Texas, Common law and Civil law antecedents) *Ker & Co.* v. *Couden* is not to be considered, since it was expressly *not dealing with* that character of prevailing law.

But what are we searching for, in the case at bar, as the *governing rule* as to seashore accretions? Is it the presently *prevailing* rule of Texas, whose *present* law *admittedly* has mixed *antecedents?*—or, is it the Civil law existing in Tamaulipas in 1827-30, when Respondents claimed grant was made? The majority opinion correctly holds that:

> "It is clear from the decisions of this court that the rights of the state and respondents must be determined in the light of the *Civil law in effect at the time of the grant* as it existed in the State of Tamaulipas. Miller v. Letzerich, 49 S. W. (2d) 404, and authorities cited. It cannot be doubted *that the law as incorporated in Las Siete Partidas* was in effect in the State of Tamaulipas at the date of the grant. In fact, on *September 21, 1821,* when Mexico gained its independence, the *Spanish Municipal law was in effect and so continued* until the State adopted its first Civil Code on June 29, 1871" (R. 349).
>
> See, also, Article 7392, R. S. of Texas, 1925, to the same effect.

So, plainly we are searching for the civil law of Spain (as that was the law in effect in Tamaulipas in 1827-30,

and long prior thereto), and *not* for the prevailing law in Texas governing grants made by the State of Texas subsequent to its statehood. Thus, the fact that prevailing Texas law of mixed antecedents is not dealt with in *Ker & Co.* v. *Couden* does not detract from the authority of that case, as we are here searching only for the Civil Law of Spain, which admittedly has *only* Civil Law antecedents.

From the opinion of this Court in *Ker & Co.* v. *Couden,* it is apparent that the controlling law for which this Court was there searching was the *Civil Law of Spain,* which was in effect in the Philippines *in* 1811, the date on which the accretion began. There is no question but that the Civil Law of Spain in 1811 was the same as the Civil Law in force in Tamaulipas in 1827-30, in so far certainly as the right to accretion is concerned, and the identical law was in force in the Philippines on both of those dates. This Court in *Ker & Co.* v. *Couden* said:

> "The seashore flowed by the tides, unlike the banks of rivers, was public property; in Spain, belonging to the sovereign power. Inst. II, tit. 1, 3, 4, 5, D. 43, 8, 3. Partidas III, tit. 28, 3, 4. And it is a somewhat different proposition from that laid down as to rivers, if it should be held that a vested title is withdrawn by accessions to what was owned before. Perhaps a stronger argument could be based on the rule that the title to the river bed changes as the river changes its place. Part. III, 28, Law 31, Inst. 2, 2, 23, D. 41. 1. 7, 5. But we are less concerned with theory than with precedent in a matter like this, whether we agreed with Grotius or not in his general view. The Spanish commentators do not help us, as they go little beyond a naked statement one way or the other. It seems to us that the best evidence of the view prevailing in Spain is to be found in the codification which presumably embodies it. The Law of Waters of 1866, which became effective in the Philippines in September, 1871, and the validity of which we see no reason to doubt, after de-

> claring, like the Partidas, that the shores (playas), or spaces alternately covered and uncovered by the sea, are part of the national domain and for public use (Arts. 1, 3) goes on thus: 'Art. 4. The lands added to the shores by the accessions and accretions caused by the sea belong to the public domain. When they are not (longer) washed by the waters of the sea, and are not necessary for objects of public utility, nor for the establishment of special industries, nor for the coast guard service, the government shall (will?) declare them property of the adjacent estates, in increase of the same'." 223 U. S. page 277.

So that there may be no question in the Court's mind as to any change in the governing law of Tamaulipas between 1811 and 1827-30, affecting or changing in any manner the law of accretion, we have made search for any such change in the laws of Tamaulipas and of Spain from 1810 to 1827-30, in fact to 1865, and find none. And simply to remove any possible question on this score, we quote the following from a brief filed in this case in the lower court by *Respondents:*

> "Careful search has been made for any constitutional or statutory law which became effective at any time from September 27, 1821 (indeed, from 1810) to the end of the year 1829, bearing directly or indirectly upon the subject o fthe respective rights of the national government, and the grantee from the State, to additions of any kind made to a tract of land fronting on a navigable stream or other water, whether such additions existed at the time of the grant or were made subsequently, and nothing has been found."

And to remove any doubt that may exist (although as a matter of history none can exist) as to whether the Civil Law of Spain is and has been in effect in the Philippines, we quote, first, from 40 Corpus Juris, 1248:

> "Into far eastern Asia the civil law was first carried by the Portuguese * * * in the early years of the

> *sixteenth century. The Spaniards, about the same time, brought their civil law to the Philippines* where largely *it still remains.* * * * "

And to remove any doubt as to whether the Civil Law of Spain in effect in 1811 (and in 1827-30) in the Philippines had by 1811 been changed or affected by any local laws or customs of the Philippines, or whether the laws contained in the Siete Partidas had by then been changed by Statute in the Philippines, we quote from the opinion of the Supreme Court of the Philippines, per Judge Willard, in *Ker & Co.* v. *Couden,* VI Phil. Rep. 732, 737:

> "With reference to the land which was formed prior to 1871 *the law governing the same is found in the Partidas,* the provisions of that body of law being applicable under the circumstances to a case of this character."

Since the Supreme Court of Texas holds that the rights of the State of Texas are to be determined in this case by the rule of the Spanish Civil Law as expressed in the Las Siete Partidas, this Court can determine that question for itself. The erroneous conclusion of the Supreme Court of Texas is not binding on this Court as a rule of local law because the Annexation Agreement guarantees to Texas, as a proprietor, the "vacant and unappropriated lands" lying within the Republic of Texas. If the accretions to Padre Island belonged to the Republic of Texas, they likewise belong to the State of Texas. They cannot be appropriated to individuals and private corporations by an erroneous decision of the Supreme Court of Texas, any more than they could be appropriated by an Act of Congress.

4. THE FEDERAL QUESTIONS THAT WERE RAISED AND THAT ARE NECESSARILY INVOLVED

(a) The United States in the Annexation Agreement guaranteed to Texas the title and possession of that part of the land in suit which was "vacant and unappropriated lands" of the Republic of Texas. The question of whether or not any part of Padre Island was "vacant and unappropriated land" within the meaning of the Annexation Agreement is a mixed question of law and fact. It was not necessary for the State of Texas to allege its rights under the Annexation Agreement in order to raise a Federal question in this connection because, first, the filing of this suit in the statutory form of an action in trespass in try title had the effect of asserting the State's rights under the Annexation Agreement; and, second, the rule of local law with reference to the burden of proof imposed on respondents the burden of disproving the Federal right which the State is presumed to have relied on. *State* v. *Balli,* Tex. Civ. App., 173 S. W. (2d) 524; *State* v. *Jadwin,* Tex. Civ. App., 85 S. W. 490, writ of error refused; *Hamilton* v. *State,* Tex. Civ. App., 152 S. W. 1117, writ of error refused. The situation, in so far as it involves the raising of a Federal question, is the same as though the State's claim were predicated solely upon a title, right, or privilege granted by the Federal Government. *Lytle* v. *Arkansas,* 63 U. S. (22 How.) 193; *Union Pacific Railway Co.* v. *James Murphy,* 115 U. S. 1; *Packer* v. *Bird,* 137 U. S. 661; *Knight* v. *United Land Association,* 142 U. S. 161; *Central Vermont R. Co.* v. *White,* 238 U. S. 507; *St. Louis I. M. and S. Ry. Co.* v. *Starbird,* 243 U. S. 592; *Brewer-Elliott Oil and Gas Co.* v. *United States,* 260 U. S. 77, 87; *Great Northern Ry. Co.* v. *Reed,* 270 U. S. 539; *Borax Consolidated* v. *City of Los Angeles,* 296 U. S. 10, 19; *Stewart* v. *United States,* 316 U. S. 354.

The State introduced its petition in trespass to try title which described the island and claimed it as State-owned land, and after an admission that the island lay in Texas, it rested (R. 71). This was all that the State was required to do in order to make out a *prima facie* case for recovery. *State* v. *Delesdenier*, 7 Tex. 75; *Day Land and Cattle Co.* v. *State*, 68 Tex. 526, 4 S. W. 865; *State* v. *Jadwin*, Tex. Civ. App., 85 S. W. 490, writ of error refused; *Hamilton* v. *State*, Tex. Civ. App., 152 S. W. 1117, writ of error refused. In *State* v. *Delesdenier, supra*, the court said:

> "In other respects, the petition was sufficiently formal. The title of the plaintiff, to the land in controversy, her ownership and right of possession were averred. There was no necessity of describing the character of her title. Had the defendant craved oyer, her Declaration of Independence, her Constitution and laws are the deed which she would have exhibited—a deed that the defendant could not have questioned—it was written upon materials more durable than parchment, and sealed with the blood of her sons." 7 Tex. p. 96, 97.

Even though we consider that the State by exhibiting its petition, which claimed land within its borders, merely created a presumption of ownership, this initial presumption was never overcome. It is true that the Supreme Court of Texas has held that respondents have good title against the State to all of Padre Island, but this holding is not based on any formal title or grant issuing from the Mexican government or from the State or Republic of Texas. The evidence of the proceedings between the Ballis and the State of Tamaulipas in 1827-30, which were offered by respondents, did not include any single instrument which constituted, under Mexican law, a severance of the land from the public domain. The respondents had only an equitable or inchoate title, if any. In other words, the

burden of going forward, as well as the burden of proof, was always on respondents and the petitioner never had the burden of attacking the validity or sufficiency of any instrument which, on its face, amounted to a transfer of any part of Padre Island, either by the Governments of Mexico, Texas, or the United States. The ultimate question, like the initial question, was whether or not the proceedings in 1827-30 were sufficient as an executory contract of sale to effect a severance of Padre Island from the Public domain of Tamaulipas, Mexico. The State Court has attempted to answer the question and we think it has, under the undisputed facts, given an erroneous answer. But, the burden of proof on the question, as well as the burden of going forward, was at all times upon respondents, who were the defendants below. It was never in order, under the local rule, for the State to affirmatively assert the source or the character of its title. The burden was upon respondents at all times to allege and prove that no part of Padre Island was "vacant and unappropriated lands" of the Republic of Texas. Only by such a showing could respondents overcome the Federal guaranty which is inherent in and forms a part of the petitioner's title. The Court of Civil Appeals in this case held:

> "The State as sovereign, by the exhibit of its petition, made out a prima facie case for the recovery of the lands described therein. State v. Delesdenier, 7 Tex. 76; Day Land and Cattle Company v. State, 68 Tex. 526, 4 S. W. 865. The burden therefore devolved upon appellees to establish that either the State of Texas, or some prior sovereign, had relinquished, ceded or granted the lands here involved to appellees' predecesors in title." 173 S. W. (2d) 522. (R. 212.)

This is a local rule which must be observed under the doctrine of *Erie Ry. Co.* v. *Tompkins*, 304 U. S. 64. *City Service Oil Co.* v. *Dunlap*, 308 U. S. 208.

The decision of the Supreme Court of Texas to the effect that the State is not entitled to the accretions to Padre Island is predicated on an erroneous conception of the Civil Law rule of accretions as it existed in 1827-30 in the State of Tamaulipas, Mexico. The decision of the Supreme Court of Texas to the effect that the original proceedings between Nicolas Balli and Juan José Balli and the State of Tamulipas, Mexico, constituted a grant of all Padre Island and not merely 11.15 leagues, involves mixed questions of law and fact. Under such circumstances this Court will review or independently determine all questions on which a Federal right is necessarily dependent. *United States* v. *Pink*, 315 U. S. 203, 217, 218. Where the existence of the alleged Federal question itself depends upon a finding of fact, this Court will examine the facts to see whether the evidence adequately sustains the findings of the State Court. *King* v. *Putnam Investment Co.*, 248 U. S. 23, *Davis* v. *Wechsler*, 263 U. S. 22, *Creswill* v. *Grande Lodge, Knights of Pythias of Georgia*, 225 U. S. 246, 261, 262, *Hoover & Allison Co.* v. *Evatt*, October Term, 1944, 89 L. ed. 852, 857. In the last case cited, this Court said:

> "In all cases coming to us from a state court, we pay great deference to its determinations of fact. But when the existence of an asserted federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity, as applied, we are free to re-examine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained. Kansas City Southern R. Co. v. Albers Commission Co., 223 U. S. 573, 591, Truax v. Corrigan, 257 U. S. 312, 325, First Nat'l Bank v. Hartford, 273 U. S. 548, 552, and cases cited; Fiske v. Kansas, 274 U. S. 380, 385, 386; Norris v. Alabama, 294 U. S. 587, 589, 590."

The majority opinion correctly holds that the rights of the parties to Padre Island are to be determined by the Mexican law in effect in 1827-30 when Nicolas Balli and Juan José Balli had their negotiations with the State of Tamaulipas, Mexico. The court said:

> "It is clear from the decisions of this Court that the rights of the State and respondents must be determined in the light of the civil law in effect at the time of the grant as it existed in the State of Tamaulipas. Miller v. Letzerich, 121 Tex. 248, 49 S. W. (2) 404, 85 A. L. R. 451, and authorities cited. It cannot be doubted that the law as incorporated in Las Siete Partidas was in effect in the State of Tamaulipas at the date of the grant. In fact, on September 21, 1821, when Mexico gained its independence, the Spanish Municipal law was in effect and so continued until the State adopted its first civil code on June 29, 1871.
>
> "The State of Tamaulipas had but one law of colonization, that is, the one of December 15, 1826, at the date of the grant in this case." 190 S. W. (2d) 94 and 99 (R. 349).

In the *Letzerich* case, the Supreme Court of Texas says:

> "It is elementary that a change of sovereignty does not affect the property rights of the inhabitants of the territory involved. Kilpatrick v. Sisneros, 23 Tex. 113, 131; Musquis v. Blake, 24 Tex. 461, 466; Airhart v. Massieu, 98 U. S. 491, 496, 25 L. ed. 213; Jones v. McMasters, 20 How. 8, 21, 15 L. ed. 805; U. S. v. Percheman, 7 Pet. 87, 8 L. Ed. 604.
>
> "After the revolution by which Mexico gained her independence, the Spanish civil law prevailed in connection with the decrees and statutes of the Supreme Government of Mexico. For four years after the successful struggle of Texas for independence, Texas retained the civil law as the rule of decision. The statutes in force in the Republic of Texas before the introduction of the common law are to be construed in the light of the Mexican civil law, and the validity

and legal effect of contracts and of grants of land made before the adoption of the common law must be determined according to the civil law in effect at the time of the grants." 49 S. W. (2) 407, 408.

Mr. Justice Sharp in his dissenting opinion in this case says:

> "The majority opinion as I understand it, holds that the respondents are entitled to all of Padre Island, based upon the proceedings emanating from the Mexican Government and de la Fuente's survey, independent of the Act of 1852; and the case of Cavazos v. Trevino, supra, is cited in support of that holding. The conclusions of the majority must find support in the assumption that the proceedings had with the Mexican Government were sufficient to pass title to Padre Island and that de la Fuente's survey covered the entire island, and that when the Ballis bought and paid for only 11.15 leagues they acquired all of the island." 190 S. W. (2) p. 106 (R. 364).

The majority opinion in this case makes the statement that

> "Whether the State of Tamaulipas had a right to recover any excess is not necessary for us to determine. It is enough to say that whatever right remained in the State of Tamaulipas, if any, passed to the State of Texas, and that such right was expressly relinquished to the owner of the island by the Act of Confirmation of February 10, 1852. This conclusion necessarily follows from the ruling made by this court in the case of Clark v. Hills, 67 Tex. 141, 2 S. W. 356." 190 S. W. (2) 98 (R. 348).

This is not a holding, however, that the act of confirmation of February 10, 1852, had the effect of enlarging the Balli title beyond the limits of the original survey. This Court has previously construed this Confirmation Act of

February 10, 1852, in *Sullivan* v. *Texas*, 207 U. S. 416, at page 423. It was there stated:

> "Coming to the merits, it is obvious that the Act of 1852 was simply a confirmation of grants made by the Mexican states. There is nothing in it which suggests the thought of new grants or of addition to old ones. The 1st section declares that the state 'relinquishes all her right and interest in the following described lands to the original grantees thereof,' and names the amount of land included in this grant so relinquished—6½ leagues. The 2d section makes it the duty of claimant to have surveys made of their existing grants. The third section makes provision in case of the loss of the 'original title papers of lands claimed by this act,' while paragraph 5 speaks of 'the confirmation herein extended to the lands mentioned in this act.' "

The Supreme Court of Texas found first that the original "grant" from the State of Tamaulipas, Mexico, to Nicolas Balli and Juan José Balli included the whole of Padre Island, and second that the Act of February 10, 1852, confirmed the title to all of the land within the original "grant." The second holding is dependent upon the first, and a reading of the majority opinion makes plain that the majority of the Court would not hold that the Act of February 10, 1852, has the effect of vesting in respondents good title to the whole of the island, *if* the original "grant" was in fact for only 11.15 leagues. The Act of February 10, 1852, has the effect of confirming the title to all the land within the boundaries of the original grant and the boundaries of the grant are determined by the outer lines of the original survey. This construction has been uniformly applied by the Supreme Court of Texas. *State* v. *Corrigan*, (Tex.) 94 S. W. 101, *Clark* v. *Hills*, 67 Tex. 141, 2 S. W. 356.

(b) The majority opinion of the Supreme Court of Texas construed Article 4, Decree 72 of the National Colonization

Law of Mexico of August 18, 1824 (See p. 12 of the Application and 1 Gammel's Laws of Texas, 39, Sayles' Early Laws of Texas, 40) as having no application to the land in suit (R. 339). The Supreme Court of Texas held "that a grant from the State of Tamaulipas of land situated within the border leagues is valid without the previous approbation of the Supreme Executive of Mexico being first obtained" (R. 340). In *Christy* v. *Pridgeon,* 71 U. S. 204, this Court held:

> "In construing the 4th article cited from the Colonization Law of Mexico, the Supreme Court of Texas has repeatedly held that it operated as a prohibition of any grant of land within the littoral or coast leagues mentioned, without the previous assent of the Federal Executive of Mexico; that such assent was essential to the validity of a grant within those limits, and that such assent was not to be inferred from the existence of the grant but must be affirmatively established. A series of decisions to this purport, from an early history of the State down to the present time, is found in the reports of her courts. These decisions have become a rule of property in that State, any departure from which would disturb titles to extensive and densely settled districts of country. Goode v. McQueen's Heirs, 3 Tex. 241; Edwards v. Davis, 3 Tex. 321; Smith v. Power, 23 Tex. 32. We receive them, therefore, to quote the language of this court, in League v. Egery, 24 How. 266 (65 U. S. XVI, 655) 'as having a binding force almost equivalent to positive law.' "

There is no evidence in this case that the Federal Executive of Mexico ever assented to the Balli "grant."

This reversal of position by the Supreme Court of Texas in its decisions which constitute a "rule of property" is not within the doctrine of *Erie Ry. Co.* v. *Tompkins,* 304 U. S. 64. The prior decisions of the Supreme Court of Texas, especially after they were approved by this Court, entered

into and became a part of the State's title as a proprietor. The State of Texas can raise, under the guarantees of the Annexation Agreement, the Federal questions which a person can raise under the Fourteenth Amendment. This ruling of the Texas Courts was challenged in the assignments of error (R. 257). By misconstruing Article 4, Decree 72 of the National Colonization Law of Mexico of August 18, 1824, the Supreme Court of Texas has deprived the State of "vacant and unappropriated lands" of the Republic of Texas, to which it is entitled under the Annexation Agreement. The validation act of February 10, 1852, which confirmed the Balli title to 11½ leagues called "Padre Island" did not affect the title to the remainder of the island. In 1851 Bourland and Miller in recommending confirmation of *only 11½* leagues estimated that Padre Island contained in excess of 30 leagues of land (R. 203).

The laws of Tamaulipas are not deemed foreign laws but they are laws of an antecedent government of which the Supreme Court of Texas and this Court will take judicial notice. *State* v. *Sais,* 47 Tex. 307, 318; *United States* v. *Pico,* 5 Wall. 536, 18 L. ed. 695.

(c) The majority opinion of the Supreme Court of Texas in this case held that the respondents were protected by Section 8 of the Treaty of Guadalupe-Hidalgo. That Court states:

> "The Legislature of Texas, at its first session after the proclamation of the treaty of Guadalupe-Hidalgo, adopted an appropriate measure to give the treaty effect.
>
> "The proviso, therefore, was intended by the Legislature to protect the grants as made pursuant to the treaty of Guadalupe-Hidalgo. • • •

"And in the Gallardo case, 106 Tex. 274, 166 S. W. 369, 373, the court says: '* * * We do not deem it necessary to reopen the question urged by the able counsel for the State as to whether property rights within the territory, over which the sovereignty of Texas was extended, were within the protection of the treaty of Guadalupe-Hidalgo. That, in relation to such rights, that treaty has the force of law in Texas has been repeatedly affirmed by this Court. State v. Sais, 47 Tex. 307; Clark v. Hills, 67 Tex. 141, 2 S. W. 356; Haynes v. State, 100 Tex. 426, 100 S. W. 912. We furthermore regard it as established in this state, under these decisions and others and in the light of the State's legislation, that a title to lands within the original Mexican State of Tamaulipas and the present boundaries of Texas that was good as against the Mexican government on December 19, 1836, the date of the act of the Congress of the republic defining the boundaries of Texas so as to include that territory, is within the protection of the treaty and entitled to recognition in the courts' " (R. 326).

This Court in *Elisha Basse* v. *City of Brownsville, Texas,* 154 U. S. 610, which also involved a title to land emanating from the former State of Tamaulipas, Mexico, dismissed an application for writ of error to the Supreme Court of Texas on the ground that,

"In McKinney v. Saviego, 18 How. 240 (59 U. S. X. V., 367), it was decided that the Treaty of Guadalupe-Hidalgo had no relation to property included within the State of Texas" 22 L. Ed. 420.

The United States District Court for the Southern District of Texas in *Amaya, et al.* v. *Stanolind Oil & Gas Co.,* 62 F. Supp. 181, has recently followed the holdings of this Court in *Elisha Basse* v. *City of Brownsville, supra,* and *McKinney* v. *Saviego,* 59 U. S. (18 How.) 367.

This question of title under the Treaty of Guadalupe-Hidalgo has been a primary issue throughout the case. The Court of Civil Appeals in its opinion said:

> "'Appellees' primary contention may be designated as 'Title under the Treaty of Guadalupe-Hidalgo.' Appellant's points relating thereto are:
>
> 'The Court's error in failing to hold that no grant from Spain or Mexico was ever issued to Padre Island (III).
>
> 'The Court's error in failing to hold that a grant of Padre Island was not in fact made and could not legally have been made under the Mexican laws then in force as applied to the undisputed facts here presented (IV).
>
> 'The Court's error in holding that the admittedly incomplete proceedings relied upon by (appellees) divested Mexico of either legal or equitable title (V).
>
> 'The Court's error in holding that the Treaty of Guadalupe-Hidalgo confirmed (appellees') or their predecessors' claims to Padre Island (VI).
>
> 'The Court's error in failing to hold that the facts proved refuted any possibility of the presumption of a grant (VII)' " 173 S. W. (2) 525 (R. 214).

The same assignments of error were carried forward in the Motion for Rehearing in the Court of Civil Appeals (R. 258) and in petitioner's application for writ of error to the Supreme Court of Texas (R. 290) and in its motion for rehearing to that Court (R. 388, 391).

(d) It was proven as a part of this record that neither the respondents nor their predecessors in title ever had the Balli claim surveyed nor did they ever file field notes of it in the General Land Office of Texas as required by the Act of February 10, 1852, the Act of August 15, 1870, and Section 8 of Article 14 of the Texas Constitution (R. 81).

Section 8, Article 14 of the Texas Constitution of 1876, provides:

> "Persons residing between the Nueces river and the Rio Grande, and owning grants for lands which emanated from the Government of Spain, or that of Mexico which grants have been recognized and validated by the State by acts of the Legislature, approved February 10, 1852, August 15, 1870, and other acts, and who have been prevented from complying with the requirements of said acts by the unsettled conditions of the country, shall be allowed until the first day of January, 1880 to complete their surveys, and the plats thereeof, and return their field notes to the General Land Office; and all claimants failing to do so shall be forever barred; provided nothing in this section shall be construed as to validate any titles not already valid, or to interfere with the rights of third persons."

Section 11 of the Texas Act of August 15, 1870, provided:

> "Be it further enacted, that all claimants under the act of February 10, 1852, and under the act of February 11, 1860 and all claimants to grants which may be confirmed by the courts under this act, shall have their land surveyed and the field notes returned to the General Land Office by the first day of January A. D. 1875, or their claims shall be forever barred and such lands shall become part of the public domain of the State" 6 Gammel's Laws of Texas, 378.

The relevant parts of the Texas Act of February 10, 1852, are quoted in the Appendix, pages 94, 95.

The Supreme Court of Texas in holding that the title of respondents was not forfeited under these statutes and the Constitution, said:

> "It will be noted that the quoted section of the Constitution has never been considered by any of the appellate courts of this state. Provision was made for surveys, field notes and patents in terms similar, and in

some cases identical, with those contained in Section 2 of the Act of Confirmation of 1852, in the Act of February 15, 1858, Laws 1857-58, c. 147, relinquishing the right of the State to certain lands in El Paso County. Clark v. Hills, 67 Tex. 141, 2 S. W. 356. The Act of February 11, 1860, Laws 1860, c. 78, provided for adjudication of claims for land between the Nueces and the Rio Grande and in the Act of August 15, 1870, and for the adjudication of title to lands situated between the Nueces and the Rio Grande originating prior to December 19, 1836. State v. Sarnes, 47 Tex. 323.

"Failure to make surveys and file field notes as required by the second section of the Relinquishment Act of February 10, 1852, and by Section 8 of Article 14 of the Constitution of 1876 has never been accorded the slightest importance either by the political authorities of Texas or by the courts. See State v. Corrigan, 94 S. W. 101; Schaeffer v. Berry, 62 Tex. 705; Haynes v. State, 100 Tex. 433, 100 S. W. 915. We are also of the opinion as was suggested by the Honorable Court of Civil Appeals, that to construe the quoted section of the Constitution in accordance with the contentions of the State *would necessarily raise serious constitutional questions.* This is certainly true in the light of clause 2, Article 6 of the Constitution of the United States and certain other constitutional provisions, including those prohibiting the impairment of obligations of contract, the denial to any citizen the equal protection of the laws, and the taking of private property without due process of law. Mr. Justice Bradley remarked in Gonzales v. Ross, 120 U. S. 605, 7 S. Ct. 705, 717, 30 L. Ed. 801, 809: 'A man whose title was good in 1876, when the constitution was adopted, whether his muniments of title were on record or not, could not be deprived of it by a simple ipse dixit of the constitution any more than by a legislative act.' " (R. 316, 317).

The Court of Civil Appeals had said:

"In our opinion, the adoption of the construction of Article XIV, Section 8 of the Texas Constitution which

is here urged by the State *would raise a grave constitutional question* as to its validity in view of certain provisions of the Constitution of the United States. See Gonzales v. Ross, 120 U. S. 605, 7 S. Ct. 705, 30 L. ed. 801; Texas Mexican Ry. Co. v. Locke, 74 Tex. 370, 12 S. W. 80." 173 S. W. (2d) p. 538 (R. 241).

This Court in *Gonzales* v. *Ross* (1886) 120 U. S. 605, 630, had said:

> "It is unnecessary, at this time, to decide upon the effect of the provision contained in that Constitution prohibiting the future registration of titles, or the depositing of them in the land office. If its effect is to make titles void which were before good, *a grave constitutional question* may arise, with regard to its validity, which we would prefer not to pass upon until it has received the consideration of a local court, state or federal."

This Court, however, was talking about Section 4, of Article 13 of the Texas Constitution of 1876.[10] This section was later held invalid in *Texas Mex. Ry. Co.* v. *Locke* (1889), 74 Tex. 370, 12 S. W. 80, as being in violation of the due process clause of the Fourteenth Amendment and the contract clause of Article 1, Section 10 of the Federal Constitution. The expression, "grave constitutional question," which this Court used in *Gonzales* v. *Ross,* has been appropriated by the State Courts in this case as an excuse for not writing on the constitutionality of the state laws involved. This Court very properly declined to pass on the validity of Section 4 of Article 13 of the Texas Constitution until after the Texas courts had spoken. The Supreme Court of Texas in this case attempts to dodge its responsibility of passing on the validity of Section 8 of Article 14 of the Texas Constitution. In justification of

[10] This section is copied in Appendix, p. 96.

its opinion it says, (1) "that to construe the quoted section of the Constitution (Sec. 8, Art. 14) in accordance with the contentions of the State would necessarily raise serious constitutional questions" (R. 319). (2) "It (Sec. 8, Art. 14) was perhaps placed in the constitution of 1876 for the purpose of relieving owners of grants of the specified class from the effects of Section 4 of Article 13 of the Constitution," (R. 316) and (3) "It is not an unreasonable construction, in order to avoid the consequences of a forfeiture, to construe the section (Sec. 8, Art. 14) to mean that the owners of grants within the limited territory described 'shall be forever barred' from receiving a patent from the State of Texas if the surveys, etc. are not filed with the Land Commissioner by the time specified, towit, January 1, 1880" (R. 319).

Section 8, Article 14 of the Texas Constitution and Section 11 of the Texas Act of August 15, 1870 are copied on page 61, above. These acts deal with a class of claimants to Mexican and Spanish grants who would not necessarily be subject to the penalty prescribed in Section 4 of Article 13 of the Constitution. See Appendix, p. 96. Section 4 of Article 13 deals with the recording of the original title either in the county in which the land lay or in the General Land Office. Section 8 of Article 14 deals with the making of surveys and plats of the Mexican and Spanish grants and the filing of the same in the General Land Office after the title has been validated by the State. It says nothing about recording the original title, and section 4, Article 13 says nothing about making surveys and plats and filing them in the General Land Office. Section 8, Article 14 has reference only to claims, such as the Balli claim, which were approved by the acts of "February 10, 1852, August 15, 1870 and other acts" and it is directly related to Section 2 of Article 7 of the Texas Constitution of 1876, which appropriated to a State "perpetual public

school fund—one-half of the public domain of the State." The requirement of Section 8, Article 14 of the Constitution that surveys of land between the Nueces River and the Rio Grande be made and plats be filed in the General Land Office within four years after 1876, was the only method employed for segregating the privately owned lands from the public domain. *State* v. *Sarnes*, 47 Tex. 323. The reason that Section 8, Article 14 was made applicable to the area between the Nueces River and the Rio Grande and to no other part of Texas was because this area had been a sort of no-man's-land between Texas and Mexico, and, as a consequence, the titles in that area were in a very confused condition. It was only in this area that the State set up a system for validation of Mexican and Spanish grants. See Article 88, *Sayles' Early Laws of Texas*, Appendix p. 97. It is perfectly obvious, therefore, that the second excuse which the Supreme Court of Texas gives for not making an outright determination of the validity of Section 8, Article 14 of the Texas Constitution on Federal grounds is wholly untenable. The reasoning of the second excuse (se p. 64 above) seems to be that since Section 8, Article 14 was placed in the Constitution to relieve "owners of grants of the specified class from the effects of Section 4 of Article 13 of the Constitution," the court should carry out the purpose of the framers by relieving the claimants of Mexican and Spanish grants not only of the requirements of Article 13, Section 4, but also of the requirements of Article 14, Section 8. This can hardly be classified as a non-federal ground on which the decision is based, but if so classified, the "ground" is wholly "unsubstantial and illusory." *Ward* v. *Love County*, 243 U. S. 17, 22; *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282, 283.

The other pretext for avoiding an outright decision on Federal grounds of the validity of Section 8, Article 14 of

the Texas Constitution, was that the words "from receiving a patent from the State of Texas" should be added after the words "forever barred" in this section of the Constitution. It is well settled in Texas that "the meaning of the Constitution is fixed when it is adopted and it is not different at any subsequent time when a court has occasion to pass on it," *Traveler's Ins. Co.* v. *Marshall*, 124 Tex. 45, 76 S. W. (2d) 1007, 1012, 96 A. L. R. 802, and that "the words are to be interpreted as the people generally understood them." *Markowsky* v. *Newman*, 134 Tex. 440, 136 S. W. (2d) 808, per Judge Slatton. The Supreme Court of Texas has the power, of course, to violate these fundamental canons of construction and to write amendments into the Constitution of Texas; but by doing so, it cannot cut off the jurisdiction which this Court has to inquire into the matter and to determine for itself whether or not a federal question is involved. *Ward* v. *Love County*, 253 U. S. 17, 22; *Rogers* v. *Alabama*, 192 U. S. 226, 230, 231; *Brenkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673; *Abie State Bank* v. *Bryan*, 282 U. S. 765, 773; *Patterson* v. *Alabama*, 294 U. S. 600.

The Supreme Court of Texas also gave as a reason for disregarding Section 8 of Article 14 of the Texas Constitution that "it has never been accorded the slightest importance either by the political authorities of Texas or the Courts," and in support of the statement, cited *State* v. *Corrigan*, 94 S. W. 101; *Schaeffer* v. *Berry*, 62 Tex. 705, and *Haynes* v. *State*, 100 Tex. 433, 100 S. W. 915 (R. 317). The cases of *State* v. *Corrigan* and *Haynes* v. *State* hold that Mexican grants in the former State of Tamaulipas are protected by the Treaty of Guadalupe-Hidalgo. The idea that this treaty somehow exempts claimants to Mexican or Spanish grants between the Nueces River and the Rio Grande, whose titles had been confirmed, from the require-

ments of Section 11 of the Act of August 15, 1870, and Section 8, Article 14 of the Texas Constitution of 1876, originated with the case of *State* v. *Sais*, 47 Tex. 307, which was decided in 1877. That suit was brought under the Act of August 15, 1870, by claimants under a Tamaulipas grant. In that case the Supreme Court of Texas said:

> "A claimant may rely upon the validity of his title under the laws of this State, including the treaty of Guadalupe-Hidalgo, which is binding as a law, without availing himself of the benefits of a suit under this law."

This is a correct statement, if the Treaty of Guadalupe-Hidalgo applies to land in Texas, since Section 11 of the Act of August 15, 1870 applies only to "claimants under the act of February 10, 1852, and under the act of February 11, 1860 and all claimants to grants which may be confirmed by the courts under this act.' Page 61, *supra*. Those who did not apply to the State for a confirmation of their titles do not come within the provisions of the Act of 1870 or Section 8, Article 14 of the Texas Constitution. There has never been a decision on the validity of the forfeiture provisions of the Act of August 15, 1870 and Section 8, Article 14 of the Texas Constitution until the present case.

The other case cited as authority for the statement that the political authorities and courts of Texas have never "accorded the slightest importance" to Section 8, Article 14 of the Texas Constitution is *Schaeffer* v. *Berry*, 67 Tex. 705. That was a suit involving the Ricon del Oso ten league grant issued to Enrique Villareal on November 16, 1831, by the State of Tamaulipas, Mexico. The City of Corpus Christi, Texas, and an oil and gas field are now located on this grant. The case was cited by the Supreme Court of Texas because of the following statement which it contains:

> "There is no evidence that the owners of the Villareal title have ever complied with the requirements of a

> survey and return of field notes to the land office in the confirmation act of February 10, 1852; in the act of August 15, 1870, or with provision of the constitution of the state on the same subject."

This, of course, is a matter for the Attorney General to investigate and act upon and not for the Courts. The State was not a party to that suit.

The Supreme Court of Texas has construed Section 2 of Article 14 of the Texas Constitution of 1876 as providing for a forfeiture. That section dealt with "unsatisfied genuine land certificates" instead of Mexican or Spanish grants which had been validated. The portion of Section 2, Article 14 which is material here reads, "All unsatisfied genuine land certificates now in existence shall be surveyed and returned to the General Land Office within five years after the adoption of this Constitution, or be *forever barred.*" In *New York and Texas Land Company* v. *Thompson* (1891) 83 Tex. 169, 17 S. W. 920, the Supreme Court of Texas held that this language barred a person who owned a genuine land certificate in 1876, when the Constitution was adopted, and who failed to have it surveyed and returned to the General Land Office within five years, from thereafter asserting any rights in the land which had been located under the certificate. When confronted with this prior decision in which the same words "forever barred" in the same article of the Constitution had been construed to mean forfeiture, the Supreme Court of Texas said:

> "The case of New York & Texas Land Company v. Thompson, 83 Tex. 169, 17 S. W. 920, 923, relied upon by the State, deals with an unlocated land certificate. An unlocated land certificate is merely 'the obligation of the government entitling the owner of it to secure the designated quantity of land by following the requirements of the law'. The effect of the Relinquishment Act of 1852 was 'to recognize the validity of the

> Mexican grant and render the title perfect as against the State.' Clark v. Hills, 67 Tex. 14, 2 S. W. 356." (R. 320).

It is to be noted that the Texas Court makes no effort to distinguish between the meaning of "forever barred" as used in Section 2 of Article 14 from the words "forever barred" as used in Section 8 of Article 14 of the Texas Constitution but attempts to distinguish its prior holding solely on the basis of the character of the right which was being forfeited. This is not a sound distinction because an "unsatisfied genuine land certificate" was a valuable, vested right and the State owned the duty not to destroy or forfeit that right by *unreasonable* subsequent legislation. The distinction which the Texas Court actually had in mind was that, in its opinion, the claims to the Balli title, unlike the claims to the genuine land certificates, were protected under the Treaty of Guadalupe-Hidalgo and that Section 8, Article 14 of the Texas Constitution would be invalid if applied to this case. The Court of Civil Appeals comes right out and says so. In the footnote on page 538 of its opinion in this case (173 S. W. (2) 522) it says:

> "It seems clear that if the title to Padre Island be protected by the Treaty of Guadalupe Hidalgo (and we have held that it is) Article XIV, Section 8 of the Texas Constitution could not be given effect as attaching a condition of forfeiture to the grant, even if appellant's construction of the Texas constitutional provision be accepted. The second paragraph of Article VI of the Constitution of the United States provides that: 'This Constitution and the Laws of the United States which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' " (R. 241, 242)

There cannot be any doubt that this construction and application of the Treaty of Guadalupe-Hidalgo is also the basis of the Supreme Court's decision in this case.

In its efforts to avoid a decision on the validity of Section 8, Article 14 of the Texas Constitution, the Supreme Court of Texas invalidated Section 11 of the act of August 15, 1870. This law (se p. 61, *supra*) expressly provided not only that claimants such as respondents "shall be forever barred", but that "such lands shall become part of the public domain of the State." It is undisputed that respondents did not comply with this law (R. 81). This act of 1870 was invoked by petitioner in its objections to the itnroduction of evidence in the trial court (R. 72) and it was urged and considered throughout the case and discussed by the Supreme Court of Texas in its opinion. (R. 317, 318), see p. 62 above. Since the Supreme Court of Texas upheld respondents' title on the basis of the Treaty of Guadalupe-Hidalgo and since only federal grounds were discussed in connection with the forfeiture provided for in Section 8, Article 14 of the Constitution, it must be presumed that the Court struck down the Act of August 15, 1870 for the same reasons. The surmise that the Supreme Court of Texas *might* have held Section 11 of the Act of August 15, 1870 invalid under some provision of the Texas Constitution is not sufficient to divest this Court of jurisdiction. *Grayson* v. *Harris*, 267 U. S. 352, 358.

There is no evidence that respondents or their predecessors in title were "prevented from complying with the requirements of" the act of August 15, 1870 "by the unsettled conditions of the country" or for any other reason. Section 8, Article 14 of the Constitution is, by its own terms, applicable only if claimants were prevented from complying with the acts of "February 10, 1852, August 15, 1870 and other acts—by the unsettled conditions of the coun-

try". The respondents never complied with the requirements of any of these acts but their reasons for failing to do so do not appear in this record. There might be an implied finding from the fact that the Supreme Court of Texas considered that Section 8, Article 14 of the Constitution was applicable, that it found that respondents had been prevented from complying with the requirements of the Act of August 15, 1870 "by the unsettled conditions of the country". However, since there is no evidence whatever in the record to support such a finding, this Court will examine the question in order to determine whether petitioner's rights have been denied on federal grounds. *Fiske* v. *Kansas*, 274 U. S. 480, 385, 386; *Creswill* v. *Grande Lodge Knights of Pythias*, 225 U. S. 246, 261.

5. THE COURT MAY DECREE A FORFEITURE IN THE PRESENT SUIT.

The respondents contended below and will, no doubt, contend here that there is no statute of Texas authorizing the Attorney General of Texas to bring a suit for forfeiture of land and no statute authorizing a "judicial inquiry" to determine such a forfeiture. The Courts below failed to notice this contention and treated the petitioner's pleadings as sufficient in this respect; however, to anticipate the contentions here we will discuss the question briefly.

The respondents cite several old cases, including *Wiederanders* v. *State*, 64 Tex. 133, decided in 1885, and *Bowmer* v. *Hicks*, 22 Tex. 155, decided in 1858, to prove that the Legislature has to date made no provisions for carrying out the forfeiture provisions of Sec. 8, Art. 14 of the Constitution of 1876.

In 1892 the Legislature passed a comprehensive Act "to limit and regulate the ownership by aliens of real estate in the State of Texas, and to provide for the escheat of

lands held contrary to law". 10 Gammel's Laws of Texas, 370. Section 6 of that Act provides, in part, as follows:

> "It shall be the duty of the Attorney General or the district or county attorney, when he shall be informed or have reason to believe that lands in this state are being held contrary to the provisions of this act, to institute suit, in behalf of the State of Texas, in the district court of the county where such lands are situated, praying for the escheat of the same, on behalf of the state, as in cases of estates of persons dying without devise thereof and having no heirs, * * *"

The Act of 1892 was amended in 1921 (General Laws of the Thirty-seventh Legislature, 20 Gammel's Laws of Texas, 261) and that portion of the above-quoted language which appears in Article 172, R. S. 1926, was reenacted. These statutes make the holdings in the cases cited by Respondents obsolete.

In 1900 the Legislature passed an Act (Acts Twenty-sixth Texas Legislature, 1st C. S. page 33, Chap. 11, Sec. 8) relating to the Public Free School Land, which reads in part as follows:

> "When any public lands are held, occupied, or claimed by any person, association or corporation, adversely to the State, or to any fund or *when lands are forfeited to the State for any cause,* the Attorney General shall institute suit therefor, for rent thereon, and for any damages thereto." (Emphasis ours.)

The above quoted portion of this Act is at present found in Article 5420, Vernon's Annotated Civil Statutes of Texas.

In 1917 the Legislature passed a bill entitled, "An Act to Amend Section 1, Ch. 26, of the General Laws of the Thirty-third Legislature, 1913, State of Texas, more clearly defining some of the duties of the Attorney General, district and county attorneys of this State and imposing other and

additional duties upon such officers, etc." This act provided in reference to the Attorney General that:

> "It shall also be his duty to institute and prosecute or cause to be instituted and prosecuted all suits and proceedings necessary to recover for and on behalf of the State all properties, real, personal, or mixed, that have escheated or that may escheat to this State under the provisions of Title 51, of the Acts of 1911, *or under any other law in existence, or that may hereafter be enacted.*"

Title 51 of the Acts of 1911 related to the forfeiture of charters of corporations for failure to pay franchise taxes, but the underscored language of the 1917 Act is broad enough to cover every other kind of forfeiture and escheat. The portion of the 1911 Act above quoted was brought forward in the 1925 codification and now appears as Article 4410, Vernon's Ann. Civil Statutes, which reads as follows:

> "The Attorney General shall institute and prosecute or cause to be instituted and prosecuted, all suits and proceedings necessary to recover for and on behalf of the State all properties, real, personal or mixed, that have escheated or may escheat to the State under the laws of the State."

Thus, in addition to Section 8 of Article XIV of the Constitution which prescribes the forfeiture, Articles 5420 and 4410, Revised Statutes of 1925, authorize the Attorney General and, in fact, impose upon him the duty to bring and prosecute suit to recover any lands forfeited or escheated to the State.

In the case of *New York and Texas Land Company* v. *Thompson* (1891), 83 Tex. 169, 17 S. W. 920, 923, the Supreme Court of Texas upheld the forfeiture provisions of Section 2 of Article 14 of the Constitution as applied to "unsatisfied genuine land certificates." In holding that

certain of these certificates were void for failure to have them surveyed and field notes thereof returned to the General Land Office within five years after the adoption of the Constitution, the Supreme Court said:

> "If the owner of a certificate should file upon land, and cause the same to be surveyed, but should fail to have his field notes and the certificate returned to the land office before the expiration of the five years, *it will require no action on the part of the state to forfeit the location,* but it would be the duty of the Commissioner of the general land office to refuse to take any step looking to a patent."

This suit, of course, constitutes a "judicial inquiry" and the statutes noted above not only clothe the Attorney General with authority to bring the suit but they expressly make it his duty to do so.

It might also be noted that in a suit in trespass to try title (Title 124, R. S. of Texas, 1925) like the first count in petitioner's Third Amended Original Petition in this case (R. 18), the plaintiff may recover only a part of the premises sued for. Article 7386, R. S. of Texas, 1925, which is now Rule 802, Texas Rules of Civil Procedure, provides:

> "Where the defendant claims the whole premises, and the plaintiff shows himself entitled to recover part, the plaintiff shall recover such part and costs."

The third count in Petitioner's Third Amended Original Petition, on which the case was tried, sought recovery of an undivided interest in Padre Island equal to the percentage which the excess (19 leagues), over and above the 11½ leagues, bears to the total area of the island (30½ leagues) (R. 38). This 19 leagues (83,132 acres) is also recoverable under the First Count in the petition as a part of the whole tract sued for. The minority opinions of the Supreme Court of Texas would allow the recovery of the

19 leagues under the First Count, since they consider the 19 leagues as vacant and unappropriated public land not included within the boundaries of any prior survey.

The second count of Plaintiff's Third Amended Petition (R. 35) is a special alternative pleading seeking a forfeiture of the title on several grounds, among them being that no survey had been made and no plat and field notes of the Balli claim had ever been filed in the General Land Office of Texas. The first count in trespass to try title is sufficient also as a basis of a judgment of forfeiture. *Day Land and Cattle Co.* v. *State,* 68 Tex. 526, 4 S. W. 865; *Kenedy Pasture Co.* v. *State,* 111 Tex. 200, 231 S. W. 683, Cert. Den. 258 U. S. 617.

6. THE STATE IS NOT BARRED BY LIMITATIONS OR ESTOPPEL

It has always been, and still is, the law of Texas that the various statutes of limitations, adverse possession, peace and repose, do not operate against the State. The Republic of Texas first enacted the 3, 5 and 10 year statutes of limitations as to real estate on February 5, 1841. Each of these statutes provided that the law "shall not bar the government." Vol. 2, Gammel's Laws of Texas, pp. 631, 632. Articles 4622, 4623, and 4624 of Paschal's Digest of the Laws of Texas from 1754 to 1873 contained the 3, 5 and 10 year statutes of limitations. Each of these articles provides that the limitations "shall not bar the government." Chapter 1 of Title LXII, entitled "Limitations of Actions for Land," of the Revised Statutes of Texas, 1879, provides in Article 3200 that "the right of the State of Texas shall not be barred by any of the provisions of this chapter." Revised Statutes of Texas, 1879, p. 464. Chapter 1 of Title LXVII, entitled "Limitations," of the Revised Civil Statutes of Texas of 1895 provides in Article 3351 that "the right of the State shall not be barred by any of the provisions of

this Chapter." Revised Civil Statutes of Texas, 1895, p. 648. The same provision is contained in Article 5683 of the Revised Civil Statutes of Texas, 1911, and Article 5517 of the Revised Civil Statutes of Texas, 1925. The identical provision is found in Article 5517 of Vernon's Civil Statutes of Texas. This rule is recognized by the Supreme Court of Texas in *Weatherly* v. *Jackson,* 123 Tex. 213, 71 S. W. (2d) 259 at pp. 264, 265, where the court stated:

> "Title cannot be acquired by adverse possession of land belonging to the state, and such possession is not evidence that the land possessed is not the property of the State. Similarly, long recognition by owners of adjacent surveys of certain lines as fixing the boundaries of the surveys cannot in any way affect public domain or appropriate any portion of it. *Ratliff* v. *Burleson,* 7 Tex. Civ. App. 621, 25 S. W. 983, 984, 26 S. W. 1003; *State* v. *Talkington* (Tex. Civ. App.) 274 S. W. 314, 316.
>
> "Defendants in error urge as additional grounds of estoppel the official maps in the Land Office, the adverse possession of the land with payment of taxes, and the failure of the Commissioners of the General Land Office, the Attorneys General and the Governors during the period of such possession to question the claim of defendants in error by instituting or causing to be instituted suit for the recovery of the land. On the authorities last above cited and for the reasons which have been set out in discussing the ruling of the Court of Civil Appeals on the question of estoppel and in passing upon the admissibility and probative value of the Land Office maps, these are not sufficient, singly or collectively, either to estop the state or to divest it of title. To the authorities may be added the rule that the failure of public officers to perform their duties will not work an estoppel against the state. 10 R. C. L. p. 705. This reference is not intended as a criticism of the public officials mentioned, for the state has made few, and no adequate, appropriations which

could be used to discover or prove the existence of unsurveyed school land adversely possessed."

In *Humble Oil & Refining Co.* v. *State* (Tex. Civ. App.) 162 S. W. (2) 119, writ of error refused, the Court held:

> "The State's title is not affected by the lapse of time, laches, adverse possession or payment of taxes. It is not estopped or otherwise adversely affected by the dereliction or failure to act of its officers, nor by the declarations or acts or long recognition of others. These principles are so well established as to be now regarded as elementary. They are discussed in Weatherly v. Jackson, supra." 162 S. W. (2) 134.

In the very recent case of *Harris* v. *O'Connor,* Tex. Civ. App., 185 S. W. (2) 993, writ of error refused for want of merit, the Court stated:

> "Furthermore, it is fundamental that a state cannot be divested of a proprietary title by limitations, laches, recognition, etc., she is not bound by the defaults or negligence of her officers or agents. Day Land & Cattle Co. v. State, 68 Tex. 526, 4 S. W. 865, Jones v. Robison, 104 Tex. 70, 133 S. W. 879; Weatherly v. Jackson, 123 Tex. 213, 71 S. W. (2) 259; Grayburg Oil Co. v. State, Tex. Civ. App., 50 S. W. (2) 355, writ refused." 185 S. W. (2) 1009.

Neither the payment of taxes nor the recovery of tax judgments on public land affects the title of the government. *City of San Antonio* v. *Earnest* (Tex. S. Ct.) 188 S. W. (2) 775.

The majority opinion of the Supreme Court of Texas does not question the foregoing principles. They are the settled law of Texas as applied to land suits such as this, where the State is seeking to recover a portion of the public domain which has been set apart to the Public Free School Fund. The judgment below was intended to be within the

framework of these well settled rules and not to do violence to them. See dissenting opinion, (R. 370).

7. THERE IS NO POSSIBILITY OF A SPANISH GRANT

This case was tried on the theory that the rights inuring to respondents, if any, by virtue of proceedings occurring prior to December 19, 1836, were established by the 1827-30 proceedings which expressly occurred "under the Colonization Laws of Tamaulipas and of Mexico" then in force, and that such proceedings were tested for validity and effect by those laws.

However, in the appeal of this case and into the majority opinion there has crept the intimation (R. 329), although not the direct holding, that *possibly* Respondents' rights are not governed by the Colonization Laws of Mexico and Tamaulipas in force in 1827-30 and the proceedings which occurred in 1827-30 expressly "in accordance with the Colonization Laws." This suggestion admittedly rests solely upon the *possibility* of a grant from Spain prior to 1827. There is not a single document, proceeding or statement emanating from Spain or transpiring before the Spanish authorities to support the claim of the possibility of a Spanish Grant.

The whole of Respondents' claim and the majority opinion's intimation as to the possibility of a *Spanish Grant* prior to 1827 is based upon two circumstances, to-wit:

1. The statement in the revoked will of Nicolas Balli, dated in 1811, in which he said:

> "I claim as my property the grazing pasture of the Island, while I am not in possession, this is due to the unsettled times, but in fact I had it surveyed and adjudicated * * *" (R. 130).

2. The statement in the Report of Bourland and Miller in 1851 in which it was said:

> "Nicolas Grisanti and Jose Maria Tobar apply for 11½ leagues of pasture land called 'Padre Island' originally granted by the Spanish Government to one Nicolas Balli and subsequently confirmed to him and his nephew Juan Jose Balli by the Mexican Authorities * * *" (R. 202).

Opposed to the first statement is the final Will of Nicolas Balli, dated in 1828, in which his sole claim was to eleven leagues of pasture land, which he stated he had had surveyed and allotted by, and was *adjusting* titles *with the* State of Tamaulipas, without any mention of a Spanish Grant (R. 177, 178).

Also, directly opposed to the first statement is the statement by Nicolas Balli, through his attorney in fact, in the very application he made in 1827 for land on the island, in which it was stated that if a testimonio of *incomplete* proceedings in an attempt to secure a grant from Spain were not found (and they were not found), then that such application should be accepted as a *new* denouncement of the land in accordance with the *Colonization Law* (R. 132).

And the Governor so accepted the application, after the incomplete proceedings were not located, and more than once expressly stated that all proceedings should be in accordance with the "Colonization Law" (R. 133, 134).

It was expressly held by the Supreme Court of Texas on remarkably similar facts, in *Edwards* v. *Davis,* 3 Tex. 321, that a claimant, having applied for a new grant under Mexican laws, had abandoned his Spanish Grant Claim and was bound by the provisions of the Mexican Colonization laws.

As to the second statement quoted, that of Bourland and Miller, it is plainly nothing more than the unsupported legal conclusion of individuals who were appointed to in-

vestigate and decide the *facts*. To accept their legal conclusion that a grant had been issued from Spain, at an undisclosed time, and a re-grant from Mexico, while rejecting their *finding of fact* that the Ballis had grazed sufficient cattle and had maintained only sufficient possession to entitle them to the grant of 11½ leagues would amount to substituting for the judgment of this Court and the Legislature an unauthorized *legal conclusion* of the Commissioners, while rejecting their *fact finding* as to the actual, physical facts of *possession* and the extent of the Ballis' asserted claim.

And, in addition, any claim that a Spanish grant may possibly have been issued and lost in the wreck of the steamer Anson is further rebutted by this admission of Respondents' counsel, the late Honorable F. W. Seabury, at the trial:

> "In order to get the facts clear in the court's mind and of counsel, under the Spanish law the protocol contains the original instrument, which is kept in the office of the Alcalde or Notary Public and the interested party is given the copy and we have here in evidence already a copy of the original in the protocol at Matamoros, the photostatic copy, and this is the first copy issued from there in 1846 to Jose Maria Tovar on the petition setting forth that he is the owner in part of that land and wanted to get a testimonio issued to him for such purpose; and in 1847, the following year, Grisante also an owner in common of Padre Island, got this identical testimonio and asks that the notary public at Matamoros be instructed to issue to him an integral testimonio for his protection and that notary public at Matamoros issued that copy to him and that was recorded here. At this point, we have in existence therefore the original in Matamoros the protocol and this duplicate original in the possession of Tovar and

another copy of the Tovar's recorded here—and we know from the report of Messrs. Bourland and Miller that a title was exhibited to them and filed with them and we know from that report that that was lost in the wreck of the steamer Anson, the one lost in the wreck of the steamer Anson was not the protocol in Matamoros and is not this testimonio, but is the instrument, the second one given to Grisante, recorded in Nueces county, and on it these commissioners upheld the grant, though they wanted to limit the quantity. It was the instrument upon which that report was founded and the Legislature confirmed this grant upon this copy that is on record here today and in the meantime the original copy of it remains in the possession of Tovar—and the fact that it is mutilated can be expected from its age. We have enough of it here to show what it is and the terms can be gotten and we have the certificate of the Notary Public and the order of the Alcalde, directing the Notary Public to make that testimonio and, by fortunate chance, it has been kept all these years'' (R. 77, 78).

The English translation of the *expediente,* or instructive dispatch, printed on pages 131 to 177 of the record is respondents' Exhibit No. 9A. There is being sent up with the record for inspection of this court a duplicate of Exhibit 9(d), which was introduced as respondents' Exhibit No. 11(d). Vol. 1, Exhibits, p. 22a. This exhibit is a photostat of the *expediente* in Spanish and it contains a photostatic copy of a tracing of the original de la Fuente map showing his survey in 1828. There is not in any of these documents any instrument issued by the King of Spain or under his authority and nothing to show the existence of any such instruments. It is significant, also, that none of the copies of the original protocol show any final grant or title from the State of Tamaulipas to the Ballis, although

the copies were made after the Texas Revolution (1836) and after Texas was admitted as a State of the Union (1845).

8. CASES IN THIS COURT INVOLVING MEXICAN OR SPANISH GRANTS IN TEXAS

The only cases that we know of involving Mexican or Spanish grants of land in Texas which have reached the Supreme Court of the United States are the following:

League v. *DeYoung* (1850) 11 How. 185, 13 L. Ed. 657;

McKinney v. *Saviego* (1855) 18 How. 235, 15 L. Ed. 365;

White v. *Burnley* (1857) 61 U. S. (20 How.) 235, 15 L. Ed. 886;

League v. *Egery* (1860) 24 How. 264, 16 L. Ed. 657;

Foote v. *Egery* (1860) 24 How. 267, 16 L. Ed. 656;

Christy v. *Pridgeon* (1866) 4 Wall. 196, 18 L. Ed. 322;

United States v. *Pico* (1866) 5 Wall. 536, 18 L. Ed. 695;

Cavazos v. *Trevino* (1867) 6 Wall. (73 U. S.) 773, 18 L. Ed. 813;

Basse v. *City of Brownsville* (1874) 154 U. S. 610, 22 L. Ed. 420;

Gonzales v. *Ross* (1886) 120 U. S. 605;

Sullivan v. *Texas* (1907) 207 U. S. 416.

Three of the foregoing cases, *League* v. *DeYoung*, *Basse* v. *City of Brownsville*, and *Sullivan* v. *Texas*, were brought to this Court by writ of error to the Supreme Court of Texas. This Court dismissed the writ in *Basse* v. *Brownsville* because "the treaty of Guadalupe-Hidalgo had no relation to property included within the State of Texas." A writ of certiorari was applied for in *Kenedy Pasture Co.* v. *State*, 111 Tex. 200, 231 S. W. 683, but it was denied (1921) 258 U. S. 617. The State of Texas has never before

applied to this Court to review any case involving Mexican or Spanish grants in Texas.

The case of *League* v. *DeYoung* arose under the laws of the Republic of Texas and before the Constitution of the United States became applicable by reason of Texas' admission to the union in 1845. The case is interesting in that it reviews the laws of the State of Coahuila and Texas, Mexico and the Republic of Texas relating to public land. The case of *Sullivan* v. *Texas* involved a construction of the Act of February 10, 1852, and the rights of claimants under a Mexican grant who asserted that the boundaries of the original grant included more land than was included in the resurvey which was made pursuant to the terms of that act, after the Mexican grant had been validated. This Court affirmed the judgment of the Supreme Court of Texas which limited the claimants under the Mexican grant to the land included in the resurvey.

The cases of *League* v. *Egery, Foote* v. *Egery* and *Christy* v. *Pridgeon* were reviewed on writs of error issued to the United States District Courts. Each of these cases affirmed decisions holding that the Mexican grants involved were void because they were issued without the previous approbation of the President of Mexico.

In none of the cases decided by this Court has there been any discussion of the rights of the State of Texas under the guarantees contained in the Annexation Agreement to the "vacant and unappropriated lands" of the Republic of Texas. The only suggested conflict that we have been able to find between the guarantees assumed by the United States in the Annexation Agreement with the Republic of Texas and the Treaty of Guadalupe-Hildago with the Republic of Mexico is the language of the Federal District Court for the Southern District of Texas in *Amaya* v.

Stanolind Oil and Gas Company, 62 Fed. Supp. 181, 195. In that case the District Court said:

> "In considering the surrounding facts pertaining to the ratification of this Treaty, it is well to bear in mind these well known facts: Previous to the Treaty of Guadalupe Hidalgo, by the annexation agreement with Texas, it was provided that Texas should retain absolute title and control over the vacant and unappropriated lands within the state. It is very probable that the annexation would not have resulted had such agreement not been made. This annexation took place nearly one hundred years ago, and throughout all that period the United States has consistently maintained a policy of non-interference concerning the lands of and in Texas. In other words, the United States has respected such annexation agreement thoroughly and consistently. It is not logical to believe that it was the intention of the United States to agree to anything in the Treaty of Guadalupe Hidalgo which would in any manner conflict with the annexation agreement made with the Republic of Texas. Directly in line with this contention respecting the sovereign right of Texas to maintain control over its lands, is the attitude of the United States in the negotiations with Mexico which resulted in the adoption of the very treaty now being considered by the court."

This Court considered the boundaries of Texas as determined by the Laws of the Republic of Texas and the Annexation Agreement in the cases of *United States* v. *Texas*, 143 U. S. 621, *United States* v. *Texas*, 162 U. S. 1, and *Oklahoma* v. *Texas*, 252 U. S. 372 and subsequent opinions in the same case. These three cases were original proceedings in this Court and they involved the northern boundary of Texas between Texas and Oklahoma and the construction of the Treaty of 1819 between Spain and the United States.

The questions which are raised in this case in reference to the Annexation Agreement were not considered in those cases.

Respectfully submitted,

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